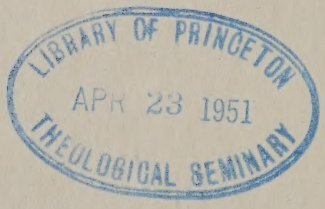

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The Separation of Religion and Government

The First Amendment, Madison's Intent, and the McCollum Decision

A STUDY OF SEPARATIONISM IN AMERICA

by

FRANK SWANCARA
Member of the Denver Bar

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FOREWORD

SOME religionists, mostly Catholic, are denouncing the decision of the Supreme Court of the United States in the *McCollum* case, which forbids the teaching of religion in the public schools.

These critics of the court are working openly to secure an overruling of the decision. They have issued books and pamphlets, published numerous articles, and delivered many addresses assailing the doctrine of complete separation of Church and State. They have at times arrogantly used, when referring to the *McCollum* case, such words and phrases as "dodge," "elaborate nonsense," and "the infamous *McCollum* decision." They misrepresent the principles of Jefferson and the intent of Madison.

The critics seem to denounce as a bigot any citizen who objects to being taxed to help support their religion. But even in apparently fair argument they ignore the declaration of James Madison, father of the Constitution, that "the separation between religion and government" is "strongly guarded . . . in the Constitution of the United States."

So zealous are the avowed enemies of Madison's doctrine that they would, if they could, nullify the First Amendment and fuse Church and State. A number of lawyers among them have offered to prepare briefs in cases seeking evasion, modification or overruling of the *McCollum* decision. It is time to sound the alarm.

Here is the answer to the enemies of Separationism. This book gives the history of the struggle to separate religion and government and clearly presents the issues involved. It also

describes the background out of which Separationism arose and records the discriminations against non-conformists and the non-religious.

As shown in this work, one of the strange contentions of the Fusionists is that the first clause of the First Amendment (mainly the work of James Madison), "Congress shall make no law respecting an establishment of religion," forbids merely establishing a single church with special privileges, but does not forbid the government to aid religion in general or all churches equally.

The contention is false. The history of the First Amendment and the specific declaration of James Madison, its chief author, disprove it. The First Amendment prohibits, not only ecclesiastical monogamy, but also ecclesiastical polygamy.

Before seeking public funds or the use of public property for its support, the Fusionists should agree on what is religion in general.

That the government should aid all religions equally would require some kind of test of what is religion. There is no such test. Is non-theistic Humanism a religion? Is Atheism a religion?

The Federal Constitution prohibits the Federal Government from establishing not merely a religion, but religions or religion in general. The Fourteenth Amendment extends the prohibition to the States. The use of tax money for religious purposes is in fact an establishment of religion.

The Fusionists contend that the *McCollum* decision forbidding the teaching of religion in the public schools is contrary to the second clause of the First Amendment, (Congress shall make no law respecting an establishment of religion) "or prohibiting the free exercise thereof."

Refusal to support a religion, religion in general or all religions equally is not bigotry.

Though, in the controversy as to the meaning of the First

Amendment, the question is irrelevant, one may inquire, Do the governments of Spain, Italy, and Ireland treat all religions alike?

The unprejudiced student will learn that complete separation of Church and State is not a shibboleth, but is an American principle; that Jefferson's figurative "wall of separation" expresses a clear rule of government; and that Madison's literal "separation between religion and government" is the law.

Whoever is interested in Separationism should read this work. It throws new light on the First Amendment and is particularly relevant to the question of Federal aid to parochial schools.

This book and its citations of authority will aid interested laymen, harassed school officials, educators, and office holders, as well as lawyers and judges, who wish to prove the justice, wisdom, and constitutionality of the *McCollum* decision.

Godfrey von Hofe
Member of the New York Bar

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PREFACE

THE writing of this book was begun as a result of seeing some of the bitter criticisms of the *McCollum* decision. These are mentioned in Chapter XI.

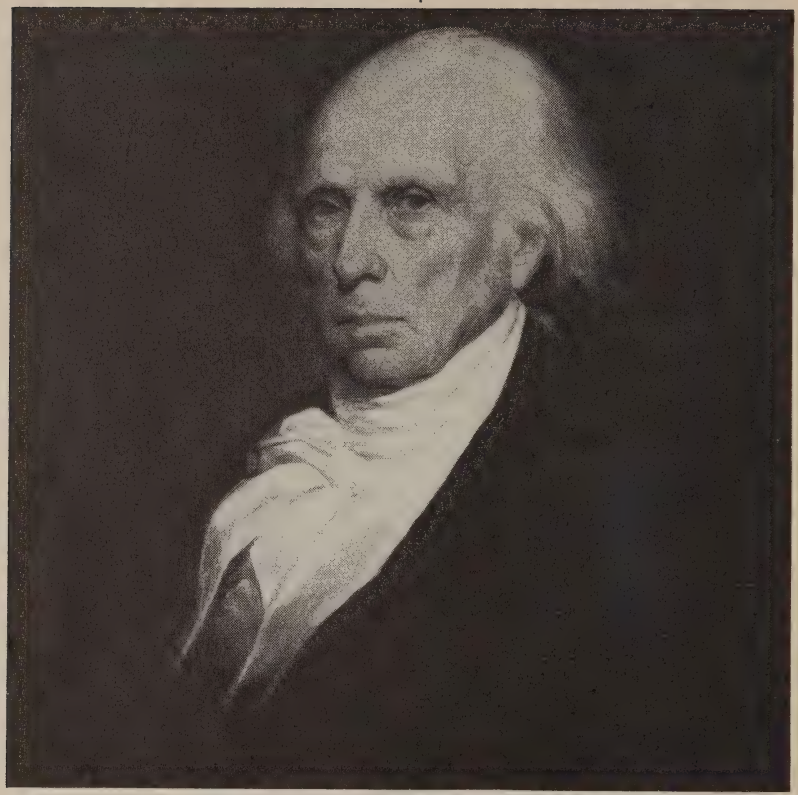
When the draft of the proposed book had been practically completed, attention was called to a new book and a review thereof, both of which assailed the decision still more severely. The historical material there used seemingly aided the authors, but invited further research, the results of which appear in various chapters hereinafter. The writings of Jefferson and of Madison surprised the writer as much as they will the reader.

The author has made use of his own manuscript prepared during the five years preceding 1935, and thoroughly documented, on Governmental Censorship in Aid of Orthodoxy and related subjects. It was never published, because potential publishers saw no money-making possibilities in it.

The present work is now published by the Truth Seeker Company as a public service.

FRANK SWANCARA,
Denver, Colo.

March 1, 1950.



Courtesy of the New York Historical Society, New York City

JAMES MADISON

Father of the Constitution

Strongly guarded as is the separation between Religion & Gov^t in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished by their short history.

Facsimile of Madison's Declaration of Separationism

"Strongly guarded as is the separation between Religion and Government in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies may be illustrated by precedents already furnished in their short history."

(For the facts concerning the manuscript from which this extract is taken, together with a list of its reproductions in full, see Appendix B.)

CHAPTER I

A BELATED RETURN TO THE CONSTITUTION

IT IS the purpose of this and other chapters to disclose the reasons, and some of the facts, in support of the proposition, upheld in the *McCollum* decision,[1] that it is in violation of the Constitution of the United States for a teacher to give, or for a board to permit the giving of, religious instruction in or through the public schools. The scope of the argument will necessarily include also a defense of the following statement of Mr. Justice Rutledge in the *Everson*[2] or "bus" case:

> "The (First) Amendment's purpose was . . . to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

Both of the foregoing decisions are consistent with what the Supreme Court had previously declared with respect to the causes for, and scope of, the First Amendment's first clause:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

It was not the Court that made "a belated return" to the Constitution, in the said decisions, but that return is being, and will be, made by school boards and other governmental officials and agencies who act in conformity with Justice Rutledge's ruling. Heretofore there have been many "practices" in violation of the First Amendment.

[1] McCollum v. Board of Education, 333 U. S. 203 (March 8, 1948).
[2] Everson v. Board, 330 U. S. 1 (Feb. 10, 1947).

This book is intended for lay as well as lawyer readers, and the text was revised accordingly. It is fortunate, at least for the author, that the *McCollum* decision made no changes in the law or in judicial reasoning. No prior cases were overruled. No earlier opinions were modified. There is, therefore, no necessity for defending the decision on the ground that changes in the law made by it were required by what legal scholars choose to call "Sociological Jurisprudence." [3] There were no changes, though it does require that some of the state courts abandon some of their prior decisions.

The sectarianism of one or more denominations has encouraged heated criticisms of opinions in the cases in question, but the average citizen is not complaining. Moreover, he is satisfied with the *McCollum* decision, not because of any law or legal reasoning, but for the reason that he feels no urge to demand that his own particular creed be given support by official recognition in the public schools or elsewhere. Notwithstanding popular acquiescence in the final judgment in the *McCollum* case, after the opinions became known to lawyers and laymen, a series of adverse criticisms, some arrogant, began in legal periodicals and elsewhere, and at least two widely circulated books severely assail the decision.

The Black and Frankfurter opinions in the *McCollum* case speak so well for themselves as to suggest that no supporting argument is needed. This writer believes he has found much in sociology, psychology, and history, not referred to in the footnotes which the Justices added to their respective opinions, that could be submitted as proof that the result was both legally and sociologically correct. It is the thesis of this book that the opinions in question deserve a permanent place as persuasive and imperative authority in all future cases involving aid to religious doctrines by or through officials, agencies, or pretended law. The reasoning of the opinions is consistent with a broader and extended application of the decision, so that "dismissed time" ought to be held as unconstitutional as "released time."

The *McCollum* decision, making it illegal to give religious in-

[3] See Prof. E. F. Albertsworth, "Program of Sociological Jurisprudence," 8 *Am. Bar Assn. J.*, 393, 396 (July, 1922).

struction in public schools, is based on the First Amendment, which situation has raised a controversy as to Madison's intent. That question will be considered in a separate chapter. An earlier chapter is devoted to the writings of Jefferson, chiefly because a small part of them is being used by hostile critics of both the *Everson* and the *McCollum* judgments.

If it is charged that Justice Rutledge did not read enough of history before writing the opinion in the bus case, it may be answered that if he had read more he would have been only more certain of the correctness of his conclusions. This statement seems dogmatic; it is hoped that subsequent chapters herein may serve as a bill of particulars.

The court did not say, but could have said, that the generally unread and much neglected histories of various religious sects, including not only the surviving but also the extinct, tend to prove that militant religionists have always been determined to propagate and perpetuate their respective creeds, and to prevent nonbelief and heresy. Often to that end, and with ambitious intent, they gained control of legislative, executive, and judicial agencies. Judges invented, and legislatures enacted, blasphemy laws to silence unbelievers who tried to be articulate. With reference to America alone, it can be said, or rather it is known, that public officials themselves were believers and would use their authority willingly in accord with the demands of the dominant religious group. The wishes of the latter became law. Sponsors of religious instruction, too, demanded that their program be enforced by law. The Champaign released time system was a form of persecution. Mrs. McCollum sensed that. The observant Justice Holmes once wrote of another form of oppression: [4]

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.

Whether persecutions have been carried on more for the purpose of securing conformity and orthodoxy than to impose suffer-

[4] Abrams v. U. S., 250 U. S. 616, 630 (1919).

ing on those hated need not be considered. Justice Holmes could have derived his idea from the historian Lecky, who, in *Rationalism in Europe,* wrote:

> If men believe with an intense and realizing faith that their own view of a disputed question is true beyond all possibility of mistake, if they further believe that those who adopt other views will be doomed by the Almighty to an eternity of misery which, with the same moral disposition but with a different belief, they would have escaped, these men will, sooner or later, persecute to the full extent of their power.

The religious mania for persecution may yet be manifested by some Fundamentalist clergymen, for as recently as 1910, one of them is reported to have said: [5]

> If I had my way I would have an executioner called in to deal with all heretics and blasphemers. Burning at the stake would be too good for those who revile religion. The growth of heresy is such today that nothing but such measures as this can stop it.

In that year President Taft was known as a heretic, as was Charles W. Eliot, president emeritus of Harvard.

In ways explained in later chapters, the early English judges, being believers, created a body of case law which was calculated to coerce the masses into believing, or at least pretending to believe, in the same creeds or whatever was taught by orthodox clergymen. Consequently the "wishes" of the Bishops became expressed in law. The attempt to "sweep away all opposition," as Justice Holmes would put it, was practically successful among the people, chiefly because it was made a common law crime to tell a British laborer something in contradiction to an orthodox catechism or religious teaching. The authorities did not ordinarily trouble themselves over what some scholar, like David Hume, would tell another, for they were interested chiefly in keeping the masses docilely devout. Today the same interest is manifested, not so much by governmental authorities as by certain religionists. They want state aid in various ways, one being the "released time" system of religious instruction involved in the *McCollum* case.

[5] *The Truth Seeker,* vol. 37, p. 406 (June 25, 1910), quoting *Toronto Telegram.*

When the framers of our Constitution intentionally omitted the name of God therefrom, and prohibited any religious test for public officials, they knew their English history, not merely that pertaining to one Established Church but also the long record of persecutions for the benefit of religion apart from any Church, and of governmental suppressions of heretical and secularist speech. Jefferson certainly did, as evidenced by his writings. So much can be said of Governmental Censorship in aid of religion that it will be treated in a separate chapter.

The explanation of how secular or temporal courts, as distinguished from ecclesiastical courts, came to the aid of clergymen, might be as follows: In 1605 one Atwood was convicted of blasphemy for having said: "Preaching is but prating; prayer once a day is more edifying." [6] That seems to have been the first case in a law court, and secular jurisdiction was taken on the theory that blasphemous remarks tend to cause a "disturbance of the peace." In Woolston's case in 1729,[7] there was added the further reason that the "roots" of doctrinal Christianity (and it was entirely doctrinal then) are a part of the law, and a decline in public acceptance or faith would imperil the stability of government. Still later prosecutions for blasphemy were sustained upon the claim that "upon our sincere faith in (the Bible) unquestionably depends our moral conduct." [8]

Under present sociological conditions and civilization, all three assumptions would be false, though the "morality" theory is still preached as a reason for various forms of state aid, not excluding the "released time" system. Aid is sought, ostensibly, for "religion," without defining that term. In practice it means acceptance of doctrines assuming the divinity of Christ. Evangelists for "released time" are discreetly silent on the question whether Unitarianism is a "religion" sufficiently terroristic to compel "morality."

[6] See Atwood's Case as discussed in Newell on Slander and Libel. Starkie, *Law of Slander and Libel* (5th ed.), p. 615.

[7] Rex v. Woolston, Fitz. 64. See any English work on Slander and Libel.

[8] Rex v. Mary Ann Carlile, 1 State Trials (N. S.) 1033.

The emphasis in coercive law in aid of religion, as revealed by reports of the blasphemy cases, is placed on the divinity of Christ and the need of him as a Savior. Thus the conviction of Waddington in 1822 was upheld because he "argues against the divinity of Christ by denying the truth of the Scriptures." [9]

In America the English decisions are treated as law because of our adoption in certain states of the common law of England.[10] Aside from that, militant religionists would still coerce the government to recognize their doctrines. Delegates to state constitutional conventions were persuaded to place religious words and expressions into preambles and clauses of constitutions. In North and South Carolina, Georgia and New Jersey it was provided that a belief in the *Protestant* religion was a necessary qualification for holding office. If power-users would outlaw fellow-religionists of a minority sect, they would be even more ruthless toward non-religious inhabitants.

In 1892 the various religious expressions in old charters and constitutions so impressed Justice Brewer that he wrote a dictum containing a quotation of the words "we are a *Christian* people." [11] In the presence of Jewish friends, some would only quote Brewer's own words, "this is a religious people." After that dictum became notorious, any citizen appealing to the courts to prevent official recognition of one or more of the basic formulas of prevailing creeds would be taunted by both adversary and judge with quotations from the Brewer dictum, and be told that religious "belief and trust . . . has received recognition in state and judicial documents from the earliest days of our republic." [12]

Religious judges would make their own additions to what had been accumulated by their predecessors. One recent accretion is the following: [13]

> The relationship of religious faith to the very foundation of our government and the welfare of society should not be severed.

[9] Barnwell & Creswell 26; 1 St. Tr. (N. S.) 1339.
[10] Peo. v. Ruggles, 8 Johnson (N. Y.) 290 (1811).
[11] Holy Trinity Church v. U.S., 143 U. S. 457, 471 (1892).
[12] Lewis v. Board of Education, 285 N. Y. S. 164, 167 (1935).
[13] Russell, J., in Peo. v. Lyons, 21 N. Y. Supp. 2d. 250, 252 (1940).

The difficulty, if not impossibility, of proving such a proposition is hereby suggested, without argument. The recital in the Declaration of Independence is that "to secure these rights [Life, Liberty, and the pursuit of Happiness], Governments are instituted among Men, . . ." To such foundation Secularism has more relationship than any "faith," for the purposes are secular.

Forced "relationship of religious faith" to government brought only needless oppressions. Thus the religious liberty clauses of the Massachusetts constitution could not be successfully invoked by a non-fearer of hell, even for the purpose of claiming the right to testify in defense of his own life. He would be told by a complacent court that the constitution has "no reference to atheists," [14] without the further observation that Unitarians, too, were outlawed for similar lack of belief in hell. Such a situation could not arise in Virginia. So held the General Court, on the authority of the Virginia statute for intellectual liberty (religious freedom).[15]

The constitution of Tennessee even yet retains the provision that no person who denies a future state of "punishments" shall hold any public office. One judge added insult to the legal disability by usurping the power to say, officially, that the Tennessee denier "cannot be trusted." [16]

For centuries religionists in public office did much to suppress heretical or secular speech and writing against the presumed verity of their theological doctrines. Retention of the power of suppression depended on indoctrination of children who would become the later subjects. But speech finally became partially tolerated after, and because, progressive thinkers became more influential. In a later chapter it is intended to explain why the influence of John Stuart Mill, the Rationalist, tended to make Coleridge, the Judge, more tolerant of secular speech.

Heretical minorities were still at a disadvantage when acquiring a restricted freedom of speech. The orthodox majorities could continue to use public officials as propaganda machines. Thomas

[14] Thurston v. Whitney, 56 Mass. (2 Cushing) 104 (1848).

[15] Perry's Case, 44 Va. (3 Gratt.) 632, 644 (1846).

[16] Peck, J., dissenting in McClure v. State, 1 Yerger (Tenn.) 206 (1829); case discussed in Ch. II of *Bad By-Products of Religion*. Also in "Judicial Vilification of a Blameless Juror," 19 Dicta (Denver) 96 (Apr. 1942).

Jefferson so realized, and would naturally wish to create public opinion in favor of free speech for minorities. He coined the slogan "Error of opinion may be tolerated where reason is left free to combat it." The only way acceptance of that principle could help Secularists was that they became in some degree "tolerated" as if afflicted with "error of opinion," notwithstanding they had no creed to spread or defend and were merely trying to secure tolerance for honest thought, opinion and speech for the politically weak persons and groups without "power" of the censorship to which Justice Holmes alluded. Furthermore, reason cannot combat religious error, for its possessor relies only on "faith" and may think that both himself and rising generations must be protected against "reason." That may be the cause of most of the censorship discussed in later chapters.

In spite of Jefferson's doctrine, religionists could be, and became, louder and bolder. They were successful in securing governmental aid in various ways, and can now boast of many "well recognized and long-established" official practices. The *McCollum* decision has long been badly needed, and belatedly came, for the sake of liberty. The thesis of this book is also to the effect that the First Amendment itself has a meaning consistent with the following words of Madison:

> Strongly guarded . . . is the Separation between Religion and Government in the Constitution of the United States. . . .

CHAPTER II

McCOLLUM DECISION ACCORDS WITH JEFFERSON'S WRITINGS

AMENDMENT I of the Constitution of the United States reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

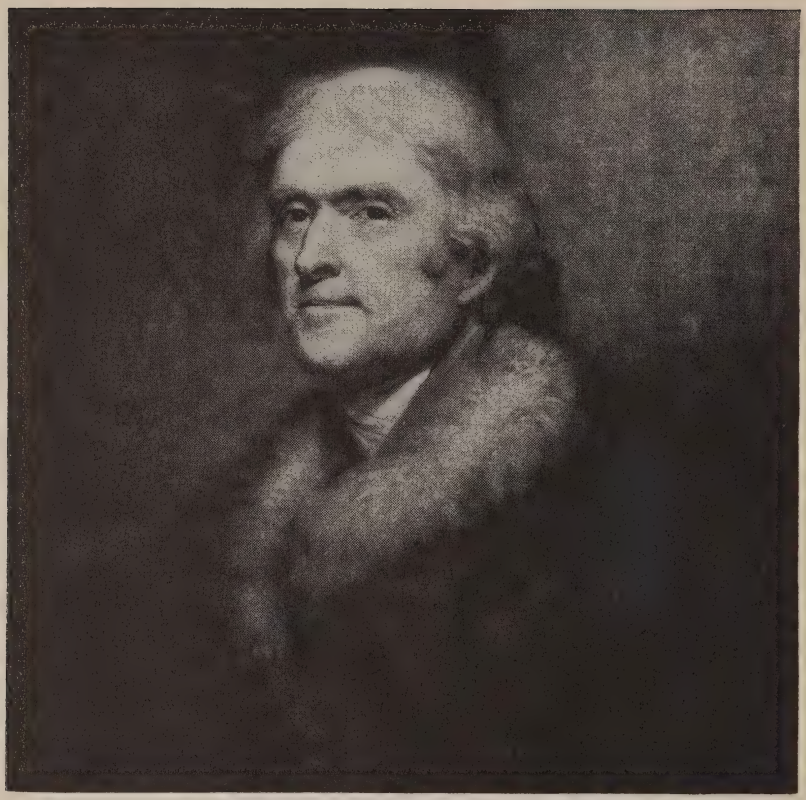
Some critics of the *McCollum* decision contend that Jefferson and others understood the words "an establishment of religion" to mean "a formal, legal union of a *single* church or religion with government." [1] Argument to that effect is made in various books and articles without taking notice of the word "thereof," as it appears in the first clause. No one denies that the last part of the clause refers to "the free exercise of" religion, not free exercise of a "single church."

In his letter of January 23, 1808, to the Rev. Mr. Millar, President Jefferson explained his refusal either to prescribe or to recommend "a day of fasting and prayer." Jefferson wrote: [2]

> I consider the government of the United States as interdicted by the Constitution from meddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law should be made respecting the establishment, or free exercise of religion, . . . But it is only proposed that I should recommend, not prescribe a day

[1] 35 *A. B. A. J.*, 758 (Sept. 1949).

[2] Thomas Jefferson, *Memoir, Correspondence and Miscellanies*, edited by Thomas Jefferson Randolph, and published in 1829, vol. 4, p. 103.



Courtesy of the New York Historical Society, New York City

THOMAS JEFFERSON

author of

The Declaration of American Independence
The Statute of Virginia for Religious Freedom

and

Father of the University of Virginia

> of fasting and prayer. That is, that I should indirectly assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from. . . .

The implications of that letter are obvious. If to prescribe, or even to recommend, a day of thanksgiving, fasting, or prayer, would be in violation of the First Amendment, then that Amendment concerns far more than the favoring of a "single church." Jefferson understood that he could grant no favor to all churches collectively, or to all sects as a whole, however much the latter would wish to join in "fasting and prayer" on a day officially designated.

All of Jefferson's words, acts, and writings, relevant to the question and taken together, prove that he regarded the First Amendment as having the effect of making the Federal Government powerless to take any action relating to religion, even to favor theism as against atheism. Even without the First Amendment the Government could not act in aid of any religion or of any of its doctrines. The states retained, and used, such powers, except that Virginia disabled herself under the Statute for Religious Freedom.

When, and because, Jefferson needed cooperation from others in order to secure passage of his Statute, he placed in the Preamble the words "Almighty God" and "Holy Author of our religion." Such expressions helped to appease the believers whose votes were necessary. But in the body of the Preamble he did not fail to place the Atheist (and therefore also the Deist, Universalist, or Unitarian) on an equal footing with a Calvinistic Presbyterian or Christian of any denomination. Some of the Preamble's clauses are: [3]

> . . . that our civil rights have no dependence on our religious opinions, . . . ; that therefore the proscribing of any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he *professes* or renounces this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; . . .

[3] Quoted in 11 *A. B. A. J.* 418. Published in 12 Henning's *Statutes* (1823) 84.

The principles of that Preamble were not at that time applied in other states, and even now (except for very recent changes unknown to this writer) it is required in Maryland, Mississippi, Texas, Pennsylvania, Tennessee, Arkansas, North Carolina, and South Carolina, as a qualification for public office that the existence of a Deity be acknowledged. In Tennessee it is required, also, that the public officer believe in "a *future* state of rewards and punishments." [4] That shows what Jefferson meant by his words "unless he *professes* . . . this or that religious opinion." (Emphasis supplied). Again, Jefferson aptly used the word "professes" instead of the verb "have" for he knew that men had been compelled to "profess" (whether or not actually having) certain religious beliefs in order to escape various legal disabilities, and to avoid being socially or governmentally persecuted. So flagrant abroad was outlawry for opinion in Jefferson's time, and in America also, that the subject deserves special attention. A later chapter is devoted to such outlawry.

Elsewhere in this book will be found reference to, or discussion of, cases where the penalty of death was inflicted upon persons for admitting belief in Deism or Unitarianism, which was simply nonbelief in Trinitarian doctrines. Such cases were known to Jefferson as a lawyer. He had them in mind when using the word "coercions" and the phrase "temporal punishments" in the second clause of the Preamble:

> I. Whereas, Almighty God hath created the mind free; that all attempts to influence it *by temporal punishments* or burthens, or by civil incapacities, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by *coercions* on either, as was in his Almighty power to do; . . .

Militant and discerning religionists were not satisfied with the language of the second clause, above quoted. Jefferson afterwards wrote:

[4] Swancara, "The Surviving Religious Test," XVIII, *St. Louis Law Review* (Feb., 1933), p. 105. Ch. XIII of *Obstruction of Justice by Religion* (Courtright Pub. Co., Denver, Colo. 1936).

> Where the Preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion;" the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.

Irving Brant writes that "The churchly opponents made every effort to weaken Jefferson's bill." [5] Jefferson was necessarily very cautious in his choice of words in favor of his Statute. Atheists and Deists were protected by his phrase "Infidel of every denomination." He had already mentioned the Mahometan and the Hindoo infidel.

As a practical politician, Jefferson did openly profess to act on behalf of what he called "religion," for that would minimize attacks on him for his protection of non-religious persons, and reduce the number of votes against his bill. Accordingly he followed the civil rights clause in the Preamble with this one:

> that it tends only to corrupt the principles of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it.

There are yet politicians who "externally profess" according to the doctrines of a vote supplying group.

Being himself an "Infidel," he was naturally opposed to any molestation of any kind of doubter or unbeliever, but he also despised any state aid to particular sects or to a group or all of them collectively, where the aid would involve recognition of doctrines. As a lawyer he knew that the English common law was in force in the colonies and would be adopted by the states. He knew that such law would bar Atheists, Deists, and Unitarians, and, technically, Jews also, from public office, and even from the witness stand, which is to say, a court of justice. He knew that the common law had made it criminal, that is "blasphemous," for one to express not merely Atheistic but also any anti-Trinitarian,

[5] Irving Brant, *James Madison: the Virginia Revolutionist, or James Madison, the Nationalist.*

though still religious, opinions. He knew that constitutions in other states would grant freedom *of* religion to those who "externally profess" a faith, while continuing to outlaw unbelievers like himself. He therefore fought, in the only effective ways then possible, for freedom *from* religion. He took the opportunity to incorporate into the Statute, after the enacting clause, the following clauses:

> . . . but all men shall be free to profess, and by argument to maintain their opinions in matters of religion; and the same shall in no wise affect, diminish, or enlarge their civil capacities.

Those two clauses were terrific blows to reactionary and political religionists, and Jefferson feared that the oppressors would some day notice the fact and clamor for repeal. Mr. Justice Rutledge in the *Everson* case made the following observation, relevant in this connection: [6]

> Jefferson, and Madison by his sponsorship, sought to give the Bill for establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies . . . and that therefore to declare this act irrevocable would be of no effect in law," the Bill's concluding provision as enacted nevertheless asserted: "Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."

From Paris, Jefferson wrote to James Madison on Dec. 16, 1786: [7]

> . . . and it is honorable for us, to have produced the first legislature who had the courage to Declare, that the reason of man may be trusted with the formation of his own opinions.

There are expressions in the opinions of some of the religious judges who sentenced men and women to prison for anti-Trinitarian discussions to the effect that "the reason of man" cannot be trusted "with the formation of his own opinions" in a matter of eternal damnation or escape therefrom. Mary Ann Carlile repub-

[6] Everson v. Board, 330 U. S. 1, at p. 35, note 15.
[7] II *The Writings of Thomas Jefferson* (1861), 67.

lished a pamphlet on the thesis that "the Church had picked out several passages from the Old Testament which she most absurdly and falsely calls prophecies of Jesus Christ." After conviction for "blasphemy," the sentencing judge said, among other things: [8]

> . . . The court has a duty . . . to the poor, who have not the means of examination, and to the young who may neglect to use the means. To these persons, whose greatest enemy you are, the court is bound to give protection; . . .

Miss Carlile had endeavored to promote, in 1821, the same Deism as that held by Jefferson.

The name of George Washington had not been connected with the struggles for the Virginia Statute, but he must have been, with Madison, on the side of Jefferson, for the latter wrote of him: [9]

> February the 1st. (1800). Doctor Rush tells me that he had it from Asa Green, that when the clergy addressed General Washington on his departure from the government, it was observed in their consultation, that he had never, on any occasion, said a word to the public which shewed a belief in the Christian religion, and they thought they should so pen their address, as to force him at length to declare publicly whether he was a Christian or not. They did so. However, he observed, the old fox was too cunning for them. He answered every article of their address particularly except that, which he passed over without notice. Rush observes, he never did say a word on the subject in any of his public papers, except in his valedictory letter to the Governors of the States, when he resigned his commission in the army, wherein he speaks of "the benign influence of the Christian religion."
>
> I know that Gouverneur Morris, who pretended to be in his secrets and believed himself to be so, has often told me that General Washington believed no more of that system than he himself did.

Jefferson's clause "all men shall be free to profess, and by argument to maintain their opinions in matters of religion" obviously alludes to the fact that religious beliefs are merely professed, with-

[8] 1 Rep. St. Tr. (N. S.) 1033. The article republished had originally appeared in 1804 in *The Prospect*, etc., in New York, edited by Elihu Palmer (1764-1806), a deist who had at one time studied for the ministry at Dartmouth College.

[9] Vol. 4 of *Memoir*, supra note 2, at p. 512.

out argument, for they rest on faith, whereas anti-religious opinions can be maintained only by "argument," for they depend on reason. This observation harmonizes with Jefferson's phrase in his letter to Madison, "the reason of man may be trusted," etc. "Faith" presupposes that reason cannot be trusted. Both faith and reason are protected by the Virginia Statute. The Bill of Rights in the constitutions of several states borrows words from the Virginia Statute, but not the "argument to maintain" clause.[10] Its anti-religious implications may have been recognized by clerical vigilantes in the conventions.

The absence of the "argument" clause from the Connecticut constitution made it easier for a court to evade the free speech clause and thus in 1916 to enforce a "blasphemy" statute.[11] The accused had spoken in a foreign language to the Lithuanian Freethought Society at Waterbury. In New Jersey, in 1889, a nonreligious person could obtain no protection from the constitutional provision that "no person shall be denied the enjoyment of any civil right merely on account of his *religious* principles."[12] The Tennessee constitution, one judge said in 1829, "has pointed her artillery against such as avow themselves to be atheists," even where they are called to, and do, serve as jurors.[13]

For the sake of brevity, one may adopt these words from a published letter:[14]

> Under the *McCollum* decision, it is unconstitutional to teach children religion in any manner or form during school hours.

But it is not easy to say, with the same author, the following:

> We believe that a careful review of the writings of Thomas Jefferson, Alexander Hamilton and others of their day will show that such was not the intent of the framers of our Constitution.

Jefferson's letter explaining why the Constitution forbids proclamations of days for "fasting and prayer" is submitted in refutation

[10] Omitted, e.g., in Sec. 3, Art. 2 Constitution of Illinois (1879), and from Sec. 4, Art. 2 Const. of Colorado (1876).

[11] Schroeder, *Constitutional Free Speech* (1916), pp. 13, 14.

[12] State v. Powers, 17 Atl. 969, 970 (1889).

[13] McClure v. State, 1 Yerger 206.

[14] 34 *A. B. A. J.* 957, 958 (Oct. 1948).

of the claim regarding the alleged "intent of the framers." Madison was careful to make his proclamations "merely recommendatory."

Jefferson as a politician and statesman, and for his own protection, was compelled to guard and restrain his pen or words, but privately and confidentially he wrote to his nephew: [15]

> Fix Reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve the homage of reason than of blindfolded fear. . . . Do not be frightened from this inquiry by any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you.

Jefferson's use of the phrase "a God" implies several or many gods and a nonbelief in any one of them, otherwise the article "a" would be useless. In the Declaration of Independence he used the words "nature's God." One is practically an atheist if he believes "Nature to be God and God to be Nature." [16]

In 1800 "he (Jefferson) was denounced for opposing the reading of the Bible by school children." In that year there was published, also, the following editorial: [17]

> Should the infidel Jefferson be elected to the Presidency, the seal of death is that moment set on our holy religion, our churches will be prostrated, and some infamous prostitute, under the title of the Goddess of Reason, will preside in the Sanctuaries now devoted to the worship of the Most High.

At that time Jefferson had not yet written many of his letters to John Adams. It was on August 22, 1813, that he wrote the letter wherein he agreed with Priestly's *Corruptions of Christianity*, and also said:

> It is too late in the day for men of sincerity to pretend they believe in the Platonic mysticism that three are one and one is three, and yet, that

[15] *Memoir*, etc., supra note 2, in letter to Peter Carr; Remsburg, *Six Historic Americans*, 65. The letter is much longer than as quoted above. It was written on Aug. 10, 1787. It is found in Parton's *Life of Jefferson*, 338, 339.

[16] U. S. v. Lee, 4 Cranch C. C. 446, Fed. Cas. No. 15,586 (1834).

[17] Charles O. Lerche, Jr., "Jefferson and the Election of 1800; a Case Study in the Political Smear," Vol. 5 (series 3), *William and Mary Quarterly* (1948), pp. 473, 474.

> the one is not three, and the three are not one. . . . But this constitutes the craft, the power, and the profits of the priests. Sweep away their gossamer fabrics of fictitious religion, and they would catch no more flies.

"A careful review of the writings of Thomas Jefferson," [18] requires attention to such of his declarations as the following: [19]

> It does me no injury for my neighbor to say there are 20 gods, or no God. It neither picks my pocket nor breaks my leg. . . . It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion, and whom will you make your inquisitors? Fallible men, governed by bad passions, by private as well as public reasons. . . .
>
> Millions of men, women and children, since the introduction of Christianity, have been burned, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half of the world fools, and the other half hypocrites; to support roguery and error all over the earth.

The word "Christianity" as used in above quotation obviously means a theological system, with a set of doctrines, such as Original Sin, and those pertaining to eternal agony and the means of escaping it. Today the same term is loosely used, sometimes as if referring only to specific sayings attributed to Christ.

Jefferson did not believe himself to be one of the "fools," which would imply that he felt impelled to play the part of a hypocrite by silence, and reveal his opinions only to a few trusted friends. We cannot be certain that he was thoroughly candid with the Danbury Baptists, for he carefully avoided mention of any Trinitarian doctrine. His letter, however, speaks for itself. It was written January 1, 1802. It is quoted in full by many writers.[20] The pertinent paragraphs are:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no

[18] An expression in a letter in 34 *A. B. A. J.* 958.

[19] Parton, *Life of Jefferson;* Part of above quotation is also found in Remsburg, *Six Historic Americans,* 74, as being copied from Jefferson's *Notes on Virginia.*

[20] Quoted in full by Prof. Sutherland in 62 *Harvard Law Review,* 1306, 1310 (June, 1949).

law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

If "religion is a matter which lies solely between man and his God," it is obviously not a matter to be interfered with by the government, and interference there is when a school board permits or directs coercion of some of the pupils to profess belief in doctrines already accepted by others. Jefferson instructed his nephew privately, and not as representative of a school district, when he wrote: [21]

Keep in your eye the opposite pretensions: 1, Of those who say he was begotten by God, born of a virgin, suspended and reversed the laws of Nature at will, and ascended bodily into heaven; and, 2, Of those who say he was a man of illegitimate birth, of a benevolent heart, enthusiastic mind, who set out with pretensions to divinity; ended in believing them, and was punished capitally for sedition, by being gibbeted, according to the Roman law, which punished the first commission of that offense by whipping, and the second by exile, or death in *furca*.

It is in the letter to the Danbury Baptists that Jefferson, after quoting the words of the First Amendment, ascribes to that Amendment the effect of "building a wall of separation between church and State." Justice Frankfurter's opinion in the *McCollum* case is criticized because it used the "wall of separation" phrase and because "that phrase is not in the Constitution." [22] Other critics are satisfied with both Frankfurter's and Jefferson's use of the phrase, but claim it means a wall of separation between "a state church . . . as the Anglican Church had been established"

[21] Letter of Aug. 10, 1787 to Peter Carr, published in Jefferson, *Memoir*, etc., supra note 2. Remsburg, supra note 19 quotes the same letter as from Vol. 2, p. 217 of *Jefferson's Works*. Mr. Steiner quotes same from Parton's, *Life of Jefferson*, 338, 339. The word "*furca*" is defined in Bouvier's *Law Dictionary* as "a fork. A gallows or gibbet."

[22] Book review in 35 *A. B. A. J.* 758 (Sept. 1949).

and the government.[23] Matters of history that refute the last named contention are mentioned in later chapters herein. As to Justice Frankfurter's choice of a metaphor, comment is unnecessary, for he could have chosen, instead, Madison's invulnerable phrase—"separation between religion and government." [24]

Proceeding now to other writings of Jefferson, notice may be taken of Jefferson's Report of Oct. 7, 1822, wherein he seems willing to permit a sect to conduct a religious school "within the precincts of the University," and so to permit also any number of "sectarian schools of divinity" to do likewise.[25] Justice Reed in his dissenting opinion in the *McCollum* case quotes from that report at length, and also the following from Jefferson's letter to Dr. Thomas Cooper on Nov. 2, 1822:

> And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.

Several matters deserve notice in this connection. First, there was nothing in the Virginia plan that would amount to a State recognition of the doctrines of any one sect or of all of them. Secondly, it was not intended to interrupt any of the secular courses by "released time" for trips to any one of the "schools of divinity." Thirdly, Jefferson's plan would, if executed, greatly cripple doctrinal Christianity. He so hoped. He wanted to soften the "asperities" of the Presbyterians. To the same Dr. Cooper, on the same day, he also wrote: [26]

> It is not so [meaning tolerance] in the districts where Presbyterianism prevails undividedly. Their ambition and tyranny would tolerate no rival if they had power. Systematical in grasping at an ascendancy over all other sects, they aim, like the Jesuits, at engrossing the education of the country, are hostile to every institution they do not direct, and jealous at seeing others begin to attend at all to that object.

[23] Editorial in 34 A. B. A. J. 704.
[24] See chapter infra on Madison's Intent.
[25] See note 11, p. 245 of 333 U. S., opinion of Justice Reed.
[26] Remsburg, supra note 19, at p. 74. Quoted by Steiner, *The Religious Beliefs of Our Presidents*, 103, as from vol. 10, p. 243 of *Writings of Thomas Jefferson* (G. P. Putnam's Sons, 1894).

Justice Reed, dissenting, actually helped the majority opinions by quoting Jefferson's letter to Dr. Cooper on the matter of mixing. There was no mixing under the Champaign Plan, for there "the classes were taught in three *separate* religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, . . ."[27] Catholic parents would not, we believe, permit their children to attend a Protestant class, and Protestant parents would remain equally sectarian. Furthermore, Jefferson's avowed preference for "a religion of peace, reason and morality" amounted to acceptance of that form of "infidelity" then known as Deism. Girard's will expressed an intention "to instil into the minds of the scholars the purest principles of morality." Daniel Webster in a forensic rage exclaimed: [28]

> The idea was drawn from Paine's *Age of Reason*, 211, where it said "let us propagate morality unfettered by superstition."

Religious instruction in or through public schools, whether by released time, dismissed time, or otherwise, is not limited to theistic ideas, but the sponsors intend, also, to strengthen or induce faith in the persecutive doctrines. Otherwise there would not have been, in Champaign, "separate" groups. Jefferson would not wish governmental recognition of doctrines which he privately rejected. It was he who wrote: [29]

> The day will come when the mystical generation of Jesus, by the Supreme Being as his father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter.

If the decision in the *McCollum* case had been the exact opposite of what it was, it would have been a readoption of the pretended maxim that "Christianity is a part of the law of the land." Jefferson in *Appendix to Report of Cases*, etc., denounced the slogan as a forgery. According to old decisions the fraudulent formula meant that each basic assumption made in orthodox creeds must be treated by the courts as true and as if it was a

[27] McCollum v. Board, 333 U. S., 203, 208 (1948).
[28] Vidal v. Girard's Executors, 2 Howard 126, 174 (1844).
[29] Jefferson, *Memoir*, etc., supra note 2 (Letter to John Adams).

legislative declaration of fact which the people must accept. In 1729 Thomas Woolston (1670-1733) denied that the miracles ascribed to Christ actually happened. His pamphlets argued that the miracles are to be taken allegorically. For that he was convicted of blasphemy and remained in prison until death. Any and all penalties for opinion were opposed by Jefferson, and to prevent their imposition he would have insisted that the Federal Government be powerless, as he made Virginia be, to recognize any creed or doctrine, and thus permit believers to have freedom *of* religion and nonbelievers to enjoy freedom *from* religion.

Freedom *from* religion, recognized by the *McCollum* opinions, is a segment of the broader right to liberty and the pursuit of happiness. People exercise that freedom naturally. Those who reject some, *but not all*, religious hypothesis, take freedom *of* religion. The last named right can be lost without injury, for it means only that a believer has a choice of creeds. Without that choice he could still silently retain his faith. If forced to attend an Established Church, his salvation would not be imperiled, but might be better assured. The Anglican Church acted consistently with this hypothesis when it tried to compel conformity. The Vicar of Bray acted accordantly, for he kept his pulpit under the whole or some part of the successive reigns of Henry, Edward, Mary, and Elizabeth, changing his theology with each change of rule in order to live and die Vicar of Bray.[30] The practice is easy; Jefferson's "hypocrites" used it. There are believers who choose, without regard to creed, the church of a spouse or mother. However, the fact that men have suffered for freedom *of* religion creates respect for that freedom. Some also died in flames for freedom *from* religion, Lucilio Vanini (1586-1619) being a historic example, and Giordano Bruno (1550-1600) being another. Most non-religious persons find silence and seeming conformity a practical necessity, but some refuse to be hypocrites for the sake of escaping persecutions. The *McCollum* decision, because of plaintiff's alleged "atheism," tends to make it respectable to be honest about opinion, and to lessen the penalties for being so.

[30] Montgomery, *English History* (1889), p. 212.

CHAPTER III

THE FIRST AMENDMENT, LIKE A LONE RANGER, RIDES AGAIN

A MEMBER of the Advisory Board of the American Bar Association Journal editorially declared: [1]

> Certainly the First Amendment, at the time it was adopted, meant no more than that *Congress* should not establish a state church in this country as the Anglican Church had been established in England. . . . That is what the carefully chosen words say and what they meant when the Constitution was adopted.

Each of the three contentions above quoted are contrary to the most persuasive evidence. The compilers of the notes to the Constitution as published pursuant to Senate Concurrent Resolution No. 35, adopted May 14, 1936, undoubtedly consulted authorities deemed most reliable. To the First Amendment they added a note which closely follows the language of Justice Field in Davis v. Beason [2] where it was said:

> The First Amendment . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, . . . The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question.

[1] 34 *A. B. A. J.* 705 (Aug. 1948).
[2] 133 U. S. 333, 342 (1890).

No "Anglican Church" is referred to, nor a "state church," and it would have been an error so to do, for Justice Kent correctly observed in considering the common law crime of blasphemy that "such offenses have always been considered independent of any religious establishment or the right of the church." [3]

Naturally clergymen would construe the First Amendment in a way most favorable to their activities. Those who drafted the Amendment said little or nothing directly in point. We can reasonably conclude, however, from all that Jefferson wrote, that not only would he prevent the evil of an established state church but also the greater evil of governmentally established theological doctrines, for he despised the prevailing tenets. Accordingly, he construed the First Amendment, or the Constitution without it, as depriving a President of the power to fix days for "fasting and prayer." Madison declared that "The establishment of the Chaplainship to Congress is a palpable violation of equal rights as well as of Constitutional principles." [4]

In 1878 the Supreme Court said that to determine the meaning of the word "religion" in the Amendment "we must go to the history of the times," [5] and then mentions the Virginia contests of 1784-1785 which concerned a bill for "teachers of the Christian religion." In 1890 the same Court, as already noticed, referred to the history of Europe "for many ages."

We are concerned with the meaning of the First Amendment where *state* action is involved. As to Congress, the Amendment simply confirmed the Constitutional principle that Congress has no power to legislate upon, or in aid of, religion. Representative Mark A. Cooper of Georgia said in the House on December 27, 1839:

> I ask gentlemen to put their hands on the authority by which they would take the money of their constituents and pay it over to a chaplain. Tell me, where is your authority for appropriating the money of the people in that way?

[3] Peo. v. Ruggles, 8 Johnson (N. Y.) 290 (1811).
[4] Madison, *Monopolies*, etc., in Fleet, Madison's "Detached Memorandum," 3 *Wm. & Mary Q.* (1946), 534.
[5] Reynolds v. U. S., 98 U. S. 145.

Cooper objected to chaplainships in order "that we may not exercise powers not granted, and may prevent a union of Church and State." Congressman Garland in the same debate said:

> There is a regular system of electioneering for the office of chaplain, and the general inquiry is, "Does he make short prayers?" Besides, while a chaplain is making his morning prayers, a large proportion of the members are reading newspapers, or walking about the hall. In fact, the service is nothing but a solemn farce.

Twelve members voted with Cooper in 1839, and twenty-one in 1840. On Feb. 28, 1860 sixty-one members voted to lay on the table a resolution for the election of a chaplain. There were no chaplains in the Convention.

Nondiscriminatory chaplainships, which Madison disapproved, could lead to sectarian ones. In Feb. 1937 it was reported in the press that "a special throne is being placed at the left of the Speaker (of the legislature of Quebec), . . . for His Eminence, Cardinal. . . ." Governor Bradley of Kentucky, in 1897, had Constitutional reasons for vetoing appointment of a chaplain by the legislature.

Religionists quote the phrase "nor prohibiting the free exercise thereof," in the First Amendment, and then argue: [6]

> Since the *type* of law which was then universal in the western world and which *necessarily* prohibited the free exercise of religion, was a law establishing a *given* religion, that type of law was specifically singled out for attention.

That could be a plausible explanation of the "free exercise" phrase, provided "*given* religion" is to mean *given* church, but it does not apply to the words: "Congress shall make no law respecting an establishment of religion," for it was an entirely different "type of law" which Jefferson, Madison and others sought to prevent. It was that part of the common law which required the government and its courts to assume as true the doctrine of torment in hell after death, and on that basis to disqualify as witnesses, and also punish as blasphemers, the nonbelievers. The same common law required that the government assume as true,

[6] 35 *A. B. A. J.* 759 (Sept. 1949).

and imprison deniers of, the doctrine that the miracles ascribed to Christ did actually happen according to the literal meaning of the words of the New Testament. The English case that recognized, in the name of the King, the doctrine assuming the verity of the miracle of the loaves and fishes was *Rex v. Woolston.*[7] That decision was familiar to lawyers both before and after the adoption of the First Amendment. That case was treated by Justice Kent as evidence of *American* law also, on the theory that we had adopted the common law of England. No church, established or not, was in any way concerned. The fundamentals of the doctrinal Christian religion had been adopted by the English courts, and they made it a crime to deny any one of the basic tenets. Accordingly, if any citizen of New York, around the year 1811, had openly denied the reality of any one of the New Testament miracles he would have been deemed guilty of a criminal offense. That was one of the types of law that Jefferson sought to end by his free speech doctrines and the Statute of Virginia.

When statesmen were still First Amendment conscious, the Senate ratified the Treaty with Tripoli, which admitted not only that we had no nationally established church but also that the "government . . . is not, in any sense, founded on the Christian religion." That broad statement contains several admissions by implication. As if to minimize the significance of the famous clause in the Treaty with Tripoli it has been said that when "Pennsylvania was not seeking favor of the Turks," [8] its courts declared:

> "The laws and institutions of this state are built on the foundation of reverence for Christianity."

No "type of law" is given as an illustration. In England the laws most influenced by "reverence for Christianity" were of a sectarian nature, as Catholic scholars can explain, and those against "blasphemy," which imposed penalties, and sometimes death, on believers of the Unitarian "type."

[7] 94 English Reports Reprint 655; Fitz. 64 (1729). The same case, and especially Woolston's writings, were familiar to clergymen also. Adam Storey Farrar, *A Critical History of Freethought* (1862), p. 321.

[8] 35 A. B. A. J. 606.

One of the first temporal prosecutions for blasphemy originated as follows: On May 11, 1675, one John Taylor was a prisoner. Because of some blasphemous expressions, the House of Lords ordered him brought before the bar. On May 14 he was sent to the hospital at Bedlam. On May 20 it was reported that he was not mad "and yet persisteth in his blasphemies." He was later prosecuted for a series of utterances which only a lunatic would make, except for the statement that "religion is a cheat." Sir Matthew Hale (now remembered as the notorious witch-hanger) decided that to say "religion is a cheat" . . . is to dissolve all those obligations whereby civil societies are preserved; and Christianity being parcel of the laws of England, therefore to reproach the Christian religion is to speak in subversion of the law." Jefferson wrote that Hale had made a like declaration in 1662 in justification for hanging Rose Cullender and Amy Duny, two old women, for witchcraft.[9] The two foregoing cases may be the historical basis for the theory that "Christianity is part of the common law of Pennsylvania." Under that theory every Modernist clergyman in that state would be a criminal, at least under the reasoning of Woolston's Case where it was held a crime to deny the miracles.

It was at one time the practice in Pennsylvania to insert in indictments a clause to the effect that the accused had acted on the "instigation of the Devil." [10] The Supreme Court of North Carolina once pretended to take judicial notice of "the seduction of the evil one." [11] Probably some other practices caused the state court in the McCollum case to say: [12]

> "Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals."

When a legislature makes Good Friday a legal holiday it subscribes not to an ideal but to the doctrine of the crucifixion. What is recognized by any political power in creating holidays demanded by the clergy, issuing proclamations for fasting and prayer, provid-

[9] Appendix to *Reports of Cases*, etc.
[10] Updegraph v. Com., 11 S. & R. 394 (1824).
[11] State v. Brandon, 8 Jones 463, 467 (1862).
[12] Peo. ex rel v. Board, 396 Ill. 14, 71 N. E. 2d 161.

ing for chaplains, is one or more of the "enormous assumptions" which, as Justice Jackson observed, "all schools of religious thought make." [13] Where that was done after the adoption of the Fourteenth Amendment there was a violation of both the letter and spirit of the First Amendment as it applies to, and for the protection of, the persons who do not make the assumptions. There is a pressure on them to acquiesce in silence, which reminds one of Justice Murphy's observation: [14]

> Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."

The "contests" were not with churches but with religionists as a class. The governmental recognition of doctrines later grew up because public offices generally became occupied, not by later and younger Jeffersons, but by pious members or appeasers of the older churches, and the officials, pretending to represent all the people and not the majorities only, usurped authority to accept doctrines, conduct some religious ceremony, or make pious declarations. There have been, of course, many officials who steadfastly remained secular in a secular office, and some are named in Chapter X, "Upholders of Constitutional Separationism."

Religionists in public office have been simultaneously representatives of both religion and government, and some would, like little Constantines, usurp the power to make the State seemingly recognize orthodox doctrines. The practice began with Christian emperors of Rome who not only made a holiday of Good Friday but provided "that it shall not be lawful for Jews to open their doors or windows on Good Friday." [15] In this country the practices have so accumulated that they are taken as evidence that "church and state . . . may work together." [16] They may, but when they do they invite oppressions of, and discriminations against, non-religious people. Illustrative is the compulsory at-

[13] U. S. v. Ballard, 322 U. S. 78, 94 (1944).
[14] Board of Education v. Barnette, 319 U. S. 624, 646 (1943).
[15] Bouvier's *Law Dictionary*, title "Jews."
[16] Reed, J., dissenting in McCollum v. Board, 333 U. S. 203, 256.

tendance at Church Services at the Military and Naval Academies. Cadet Ulysses Simpson Grant once suffered from that.[17]

The idea that "church (or religion) and state . . . may work together" has been so long applied in various ways as to invite acquiescence, but it has injured minorities. Judges have ignored that fact. In cases affecting competency of non-religious witnesses, courts came to be willing to give a ruthless rapist an advantage over his victim. If a woman who happens to be non-religious is assaulted in Arkansas and later is offered as a witness at the trial of the attacker, the proceeding may be converted into a religious inquisition against her. The assailant would be the accuser; she the accused, charged with non-fear of hell. If so admitting, she would become incompetent to testify. The ultimate result might be, consistent with a Louisiana case,[18] that the criminal would be set free, for lack of witnesses, while the complainant is "hissed out of court"[19] by religious spectators. The evolution and existence of such American outlawry for opinion deserves reexamination and exposure, and will be treated in a separate chapter.

The influence of religious doctrines on a judge caused a decision to take from the poet Shelley his children because he was not repenting his authorship of *The Necessity of Atheism*.[20] Other judges deprived Mrs. Besant of the custody of her infant daughter because the mother had published secularistic articles.[21] Such precedents encouraged an attempt in Georgia in 1870 to deprive an "Infidel" Universalist of the custody of a minor.[22]

[17] Helen Nicholay, "The Boyhood and Youth of General U. S. Grant," *St. Nicholas Magazine* (Sept., 1909).

[18] State v. Washington, 49 La. 1602, 22 So. 841, 42 L. R. A. 553 (1898). There a conviction of rape was reversed because the child victim, aged seven, "never heard of the devil or the bad man or what would become of her if she told a lie" and had no knowledge of an oath.

[19] A prospective witness was so "hissed" because of his atheistic opinions, it was recalled in Stanbro v. Hopkins, 28 Barb. (N. Y.) 265, 268.

[20] Shelley v. Westbrooke, Jacob 266, 37 Reprint 850. The essay is referred to in 11th ed. *Enc. Brit.*, tit. Shelley.

[21] In re Besant, 11 L. R. (Ch. Div. 1879), 508. The case is referred to in Annie Besant, *Autobiography*. Titles of many Besant pamphlets are collected in Bibliography of John Edwin McGee, *A History of the British Secular Movement*.

[22] Maxey v. Bell, 41 Ga. 184 (1870).

The Bishop of London induced the judicial murder of Woolston. "The Society to Enforce His Majesty's Proclamation for the Suppression of Vice," which had clergymen in its membership, instigated the prosecution of Williams not for "vice" but for selling a copy of Paine's *Age of Reason*. The accused was convicted, and the sentencing judge said, among other things, that attacks on Christianity (which he understood, correctly, to be Trinitarian) are crimes which tend to strip the law "of one of its principal sanctions—the dread of future punishment." [23] Under that opinion, all argument against the verity of the doctrine of hell would be a crime.

The name of Thomas Paine, author of *The Age of Reason*, was selected in 1945 for inscription in the Hall of Fame for Great Americans.[24] Jefferson and John Adams were among the first chosen by the College of Electors in 1900. The nature of objections to the name of Thomas Paine at that time may be inferred from the following words of Lord Kenyon in 1797:

> . . . three years imprisonment has been ordered for an offense of much less enormity than this [selling one copy of *The Age of Reason*], for this publication is horrible to the ears of a Christian.

That was said in the Williams' case where it was also repeated: "The Christian religion is part of the law of the land." When, in 1819, Richard Carlile was prosecuted for the sale of *The Age of Reason* the judge said: [25]

> The law says no man shall deny the truth of the Christian religion, or deny that the Scriptures of the Old and New Testaments are of Divine authority. . . .

Jefferson would, of course, despise such a law, and John Adams, the second President, hated it no less, for in his letter to Jefferson under date of January 23, 1825, he criticizes the blasphemy statute of Massachusetts, and says it would be unsafe to "translate Dupuis." [26] He was referring to Prof. Charles Francois Dupuis

[23] 26 Howell's State Trials, 654, 713.
[24] The World Almanac (*N. Y. World-Telegram*, 1948), p. 299.
[25] Bonner, *Penalties Upon Opinion*, 40.
[26] Vol. 10, p. 415, *The Works of John Adams* (1856).

(1742-1809) who in 1781 "began to trace all religious myths to astronomical truths." [27]

The many blasphemy cases in England, and the few in America, were consistent with the idea that religionists and public officers may work together in such a way that the doctrines of the influential religionists are recognized as true by the government, and unbelief is punished as a crime, notwithstanding that honest opinion is a matter of reason only. Such recognition by the State was a form of terrorism against doubters and reasoners. Furthermore, the believing majorities regarded the governmental action as further proof of the verity of their doctrines. That naturally tended to make them more persecutive than ever. John Adams must have found something in history or elsewhere which caused him, in a letter to Jefferson under date of April 19, 1817, to include these words: [28]

> Twenty times, in the course of my late reading, have I been on the point of breaking out, "this would be the best of all possible worlds, if there were no religion in it."

If he had not, he could have, thought of the historic example of union of religion and State when Catherine de Medici (1519-1589) induced King Charles IX to start the Massacre of St. Bartholomew (Aug. 24 to Sept. 17, 1572). Justice Field referred to "cruelties . . . for many ages" when writing of the "adoption" of the First Amendment.[29]

It is impossible, within the space of this chapter, adequately to describe many of the forms of cruelty which Justice Field believed "led to the adoption of the amendment in question." [30] Some will be described in later chapters. The First Congress complied fairly well with both the letter and the spirit of the First Amendment, even prior to its adoption. The legislators consciously refrained from aiding religion when prescribing the form of oath or affirmation for Senators and Representatives, a form which

[27] McCabe, *Biographical Dictionary of Ancient, Medieval, and Modern Freethinkers.*

[28] Vol. 10, p. 254, *The Works of John Adams* (1856).

[29] Davis v. Beason, 133 U. S. 333, 342 (1890).

[30] Davis v. Beason, supra note 29.

omitted all reference to God. Thereafter strict neutrality in matters of religion was intermittent. One may suspect that the Congress aided not only religion but also a particular sect when it directed the Secretary of the Treasury to admit "free of duty" the pictorial windows imported by the "Gate of Heaven Church." [31] In 1913 the House printed prayer books for its members. In 1892 it yielded to religious pressure by making appropriations for the World's Columbian Exposition "upon the condition that" the fair be closed on Sundays.[32] In 1924 it denied compensation to teachers in the District of Columbia who might be suspected of "disrespect of the Holy Bible." [33] In the Act of Aug. 7, 1947, there is this provision: [34]

> That there shall be . . . a Chief of Chaplains . . . and such officer shall . . . receive the pay and allowances provided by law for rear admirals of the upper half.

Violations of the First Amendment by the Federal Government and also by States in recent years had become so frequent, and objectors were so little heeded, that the general public was lulled into forgetfulness of the Amendment. Where a government, national or local, is controlled by men believing themselves religious, that government on its own initiative will aid Fundamentalist doctrines. Accordingly, the Tennessee anti-evolution statute might have been enacted without pressure from religionists in private life. In other states anti-evolution lobbyists were active, and influential. Religious ceremonies and instruction finally got into many public schools. "Practices" of fusing government and religion became so numerous and settled as to create the presumption of validity, and they caused Justice Reed to say: [35]

> This court cannot be too cautious in upsetting practices embedded in our society by many years of experience.

[31] 37 St. Pt. 2, p. 1028.
[32] Act of Aug. 5, 1892, section 4.
[33] 43 St. 553.
[34] 61 Stat. 880.
[35] 333 U. S. 203, 209.

But Justice Frankfurter refused to assume or pretend to believe that repeated violations of the First Amendment cease to be violations because of the repetitions or because of a "practical construction" evidenced by such practices. Of his opinion, Dean Jaffe wrote: [36]

> The great number of legislatures, school boards, and courts which in the exercise of judgment had sustained these schemes was felt rather to be just one more token of danger than to be evidence of a reasoned approach to the widely felt need for religious instruction.

Justice Frankfurter as a practical sociologist perceived that the long series of religious usurpations by public officials, many of which were upheld by state courts, was "just one more token of danger" to freedom of and from religion. Ignoring such danger, or increasing it, some critics of the *McCollum* decision have launched the doctrine that constitutional interpretation ought not to conflict "with accepted habits of our people." [37] That would tend to legalize, and therefore to encourage, persecutions. Majorities could make laws to tyrannize minorities and then boast they are protecting "accepted habits of our people." Catholics once noticed this fact, in this country, when contesting the right of school boards to prescribe Protestant instruction in tax-supported schools.[38]

The *McCollum* decision does not interfere with "habits of the people" to worship privately. The effect of the decision is that self-appointed evangelists cannot lawfully force Fundamentalist worship and instruction into public schools that are patronized by non-religious and Modernistic families.

The Black and Frankfurter opinions revived the dormant First Amendment, and made it, at least temporarily, a Constitutional Lone Ranger which protects the liberty of conscience of non-religious persons. The court refused to cripple the Amendment by "practical construction" or otherwise, just as the 43rd Congress

[36] Louis L. Jaffe, "The Judicial Universe of Mr. Justice Frankfurter," 62 *Harvard Law Review* 357, 401 (Jan., 1949).

[37] Diss. op. of Reed, J., as quoted in 34 *A. B. A. J.* 482, 483 (June, 1948).

[38] E.g., Peo. ex rel v. Board, 245 Ill. 334, 92 N. E. 251; Peo. ex rel v. Stanley, 81 Colo. 276, 255 P. 610.

refused to destroy it by further amendment. On Feb. 18, 1874, the committee on the judiciary (in the House) of which Benjamin F. Butler was chairman, reported as follows: [39]

> The Committee on the Judiciary, to whom was referred the petition of E. G. Goulet and others, asking Congress for "an acknowledgment of Almighty God and the Christian religion" in the Constitution of the United States, having considered the matter referred to them, respectfully pray leave to report:
>
> That, upon examination even of the meager debates by the fathers of the Republic in the convention which framed the Constitution, they find that the subject of this memorial was most fully and carefully considered; and they, in that convention, decided with great unanimity, after grave deliberation and in full realization of the dangers which the union between church and state had imposed upon so many nations of the Old World, that if the government whose foundations they were then laying was to be the home of the oppressed of all nations of the earth, whether Christian or Pagan, it was inexpedient to put anything into the Constitution or frame of government which might be construed to be a reference to any religious creed or doctrine.
>
> And they further find that this decision was accepted by our Christian fathers with such great unanimity that in the amendments which were afterwards proposed, in order to make the Constitution more acceptable to the nation, none has ever been proposed to the states by which this wise determination of the fathers has been attempted to be changed. Wherefore, your committee reports that it would be inexpedient to legislate upon the subject of the above memorial, and ask that they be discharged from the further consideration thereof, and that this report, together with the petition, be laid upon the table.

On Jan. 25, 1894, another attempt was made to secure a proposal of a "God, Christ and the Christian religion" amendment to the Constitution. No action was taken by the committee.[40] From that time on what did happen for or against fusion of government and religion may be as indicated by the dissenting opinion in the *McCollum* case. Either the First Amendment was paralyzed by "interpretation" or its violators applied the philosophy of "What's the Constitution as between friends?" [41]

[39] Richard J. Cooney (attorney) in 47 *The Truth Seeker* 387 (June 19, 1920).

[40] Id., citing *Cong. Record* of that date.

[41] Mr. Schroeder in discussing "Our Vanishing Liberty of the Press" observed: "Some years ago a United States Senator (Mr. Cullom) was reported

The *state* court in the *McCollum* case said: "The government does not recognize a *particular* faith but this does not mean that it is indifferent to religious faith." That was, in effect, the formula which defeated Edward C. Reichwald, then secretary of the American Secular Union (1913), in his application to restrain Cook county from giving preferential aid to the Catholic bishop by allowing him to build a church on the grounds of the county poor farm.[42] There the court created the further formula in the words; "The man . . . has no right to insist that others shall have no religion." No one pretends to have that kind of "right," but does claim the rights belatedly explained in the *Everson* bus case and the *McCollum* school case by the Supreme Court of the United States. It was in the bus case, of course, that the First Amendment had its resurrection. Forgotten history, not "prepossessions," was the reviving factor. Sociology contributed, as in the case in England in 1917 where the House of Lords repudiated a long line of decisions which had made it a crime freely to discuss the doctrines of men having the power to punish discussion.[43] The *Harvard Law Review* observed that the Lords established "for the first time . . . in the English law a real freedom of decorous religious discussion." [44]

In some of the attacks on the humanitarian *McCollum* decision there appears the slogan ". . . our jurisprudence is deeply rooted in religion." [45] That is a restatement of Justice Holmes' slogan "If you have no doubt of your power . . . you naturally express your wishes in law. . . ." [46] The religionists were in power, and mixed "jurisprudence" with their own theological doctrines.

as saying that 'in the United States there is no constitution but public opinion.' We should also remember the unconscious humor which made Congressman Timothy Campbell famous. He was urging President Cleveland to sign a bill which had passed Congress and the latter objected because he believed the bill to be violative of the organic law. Our ingenious statesman broke in with this earnest plea: 'What's the Constitution as between friends?' . . ." Schroeder, *A New Concept of Liberty* (1940), p. 81.

[42] Reichwald v. Catholic Bishop of Chicago, 258 Ill. 44, 101 N. E. 266.

[43] Bowman v. Secular Society, Ltd., (1917) A. C.; Ann. Cas 1917 D 761.

[44] 31 *Harv. L. R.* 289, 291 (Dec., 1917).

[45] Clarence E. Manion used the expression in 32 *J. Am. Jud. Soc.* 70 (Oct., 1948).

[46] Abrams v. U. S., 250 U. S. 616, 630 (1919).

The masses had nothing to do with the origin and development of the common law. The slogan or phrase "deeply rooted in religion" expresses the truth, and at the same time the reason for the First Amendment. Some palliative, if not cure, was needed for the sake of human happiness not marred by religious policing. Those people, in all times, who did not voluntarily belong to the same group that created the "jurisprudence" in question suffered much, and paid dearly, as a result. The story is too long even to be summarized here.[47]

Jehovah's Witnesses deserve some of the credit for the renaissance of the First Amendment. But they, like the Catholics before them, helped to free from persecution only minorities that are *religious*. On their behalf Chief Justice Wilson of the Supreme Court of Minnesota said: [48]

> Is there not an interference with the "rights of conscience" when we read in our schools a Bible whose dedication assails the Pope as the "man of sin" and accuses him of desiring to keep the people in ignorance and darkness? The Catholic considers, and well he may, that the Bible is read [in schools] in a spirit of worship.

"Rights of conscience" seem recognized by certain persons as if possessed by Fundamentalist believers only. The *McCollum* decision implies that no governmental agency may insult the opinion of any one, in matters of religion, by pretending to agree with some other and more popular opinion.

If, as Justice Field said, the First Amendment was adopted in the light of "the cruelties . . . inflicted . . . for many ages," then any one or all of such cruelties are relevant in the matter of construing that Amendment.

The sponsors of the First Amendment could have acted on the basis of 18th century history alone. That was enough to make them wish to free our government not merely from any one ecclesiastical Octopus but from mass and political religion of any

[47] Swancara, *Obstruction of Justice by Religion* (Courtright Pub. Co., Denver, Colo., 1936), reviewed in 25 *A. B. A. J.* 343 (Apr., 1939); 23 *Va. Law Rev.* 240 (Dec., 1936).

[48] Kaplan v. Ind. Sch. Dist., 171 Minn. 142, 214 N. W. 18, 57 A. L. R. 185 (1927).

kind, intending thereby to benefit both the State and religion as privately exercised by actually devout believers.

The history and tyranny of religious jurisprudence is nowhere taught, and since a study of such subjects leads to no revenue, lawyers are not familiar with it. Jewish scholars presumably know what happened to their people. Accordingly, the Synagogue Council of America filed a brief in the *McCollum* case. Unitarian historians presumably know how the writ of *de haeretico comburendo* was issued for the burning of Legate (1611). Accordingly, and for many better reasons, The American Unitarian Association filed a brief. Urging reversal of the *state* court judgment, briefs were filed also by the General Conference of Seventh Day Adventists, and by the Joint Conference Committee on Public Relations of several Baptist Conventions. Dr. Joseph M. Dawson, associated with that committee, in his *Separate Church and State Now* (1948), approvingly cites the *McCollum* decision as one that "finally closed the door . . . against the evils . . ." (referring to some of the effects of "released time" religious instruction).

CHAPTER IV

MADISON'S INTENT

THE opinion of the court, delivered by Mr. Justice Black, in the *Everson* case, contains the following passage: [1]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. (italics ours).

In so far as the foregoing uses the phrase "aid all religions," it is contended by some religionists and their supporters that it is a "historical misinterpretation of the First Amendment," and that it was an "objectionable error" [2] to adopt that passage as part of the opinion in the *McCollum* case. Justice Rutledge in the *Everson* case declared that the First Amendment forbids "every form of public aid or support for religion." He further stated: [3]

> In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

One bold critic answers that "no such consistent utterances can be referred to because there is none." That statement impels re-examination of some of the Court's prior utterances.

Justice Black in support of his statement, which did not ma-

[1] Everson v. Board, 330 U. S. 1, 15.
[2] Book reviewer in 35 A. B. A. J. 758, 760.
[3] Everson v. Board, 330 U. S. 1, 32.

terially differ from that of Justice Rutledge, cited *Reynolds v. United States*[4] (1878), which seems "consistent" enough. There the court's attention was fixed directly upon the question. Jefferson's letter to the Danbury Baptists, and Madison's *Memorial and Remonstrance*, received due consideration. The significant words of the court were these:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

What religionists overlook in their legal arguments is that their theological doctrines are "mere opinion," and being such, Congress has no power either to deny or to recognize such doctrines. A recognition would be an "aid." Some states have aided "all religions" in the sense of all Christian sects by making Good Friday a legal holiday. They cannot constitutionally do so now.

In the *Reynolds* case the court said that to ascertain the meaning of the word "religion" in the First Amendment "we must go elsewhere, . . . and nowhere more appropriately . . . than to the history of the times. . . ."[5] To get at all the "history" it is necessary to find also the hidden history, that is, to break through the religious censorship on parts of history. Justice Rutledge did so, at least partially, and so did the author Fleet, cited in notes to Court's opinion in the *Everson* case.[6]

In *Davis v. Beason*, in 1890, the court said much that is "consistent" with the *McCollum* decision. The significant words were:[7]

> . . . the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs, . . . to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, . . . led to the adoption of the amendment in question.

The meaning of the phrase "legislative power over mere opinion," as used in the *Reynolds* case is evident from the govern-

[4] 98 U. S. 145.
[5] 98 U. S. 145, 162.
[6] Notes 12 and 13 in 330 U. S. 1, 12.
[7] 133 U. S. 333, 342.

mental "cruelties" alluded to in the *Davis* case. The meaning is partially revealed by what was done in Champaign which gave rise to the litigation over released time. The school board, as a state agency, undertook to legislate "over mere opinion" when it authorized religious teachers to instruct according to the creeds of the parents. Two of the three groups could be taught that Mary "was found with child of the Holy Ghost." [8] Thus the state of Illinois, through a school board, legislated "over mere opinion" by pretending to recognize an opinion as the equivalent of a fact, and thus indirectly stigmatize Mrs. McCollum and her son who did not believe in the actuality of the Holy Ghost.

Madison's *Memorial and Remonstrance* can no longer be ignored. It has become familiar to many. Justice Rutledge revived it, and taught us a lesson in American history that most of us had never learned. There is a passage in the *Remonstrance* which supports the *McCollum* decision, strongly, and yet critics of that decision quote the same sentence as one inconsistent with the decision. What the *Remonstrance* said, in this connection, was:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?

The danger always was, not that politicians would seek to establish one *church*, but that they would pretend to aid "Christianity, in exclusion of all other Religions," in a way satisfactory to the stronger sects or all of them. That was politically expedient. The Champaign school board, too, and pressure groups, thought it expedient to please the predominant sects and the Jews. Madison realized, and tried to make it clear, that to favor officially the Christian religion, to please *all* Christian sects, is just as arbitrary and tyrannical as to favor *one* sect alone. There would be a discrimination against non-religious people, and also against non-Christian believers.

Massachusetts established the *Protestant* religion in several ways. The statutes of 1697 and 1782 punished for "reproaching the Holy

[8] Matt. 1:18.

Word of God," naming all the canonical books to be officially recognized as such Word, but omitting First and Second Maccabees, which are found in Catholic versions. John Adams denounced such statutes. His letter to Thomas Jefferson contained the following: [9]

> We think ourselves possessed, or, at least we boast that we are so, of liberty of conscience on all subjects, and of the right of free inquiry and private judgment in all cases, and yet how far are we from these exalted privileges in fact! There exists, I believe, throughout the whole Christian world, a law which makes it blasphemy to deny or doubt the divine inspiration of all the books of the Old and New Testaments, from Genesis to Revelation. In most countries in Europe it is punished by fire at the stake, or the rack, or the wheel. In England itself it is punished by boring through the tongue with a red-hot poker. In America it is not much better; even in our own Massachusetts, which I believe, upon the whole, is as temperate and moderate in religious zeal as most of the states, a law was made in the latter end of the last century, repealing the cruel punishments of the former laws, but substituting fine and imprisonment upon all those blasphemers upon any book of the Old Testament or New. Now, what free inquiry, when a writer must surely encounter the risk of fine or imprisonment for adducing any argument for investigation into the divine authority of those books? Who would run the risk of translating Dupuis? But I cannot enlarge upon the subject, though I have it much at heart. I think such laws a great embarrassment, great obstructions to the improvement of the human mind. . . . I wish they were repealed.

Twelve years earlier Adams had written to Jefferson: [10]

> "It is very true that the denunciations of the priesthood are fulminated against every advocate for a complete freedom of religion. . . .

By means of its blasphemy statute Massachusetts now apparently establishes the *Christian* religion, and that is also the situation in Maine, its statute providing punishments for "contumeliously reproaching . . . the Holy Scriptures." The Supreme Judicial Court assumed that the language of the First Amendment would make such statute void if it had been enacted by Congress.[11] Other states establish the doctrine of a Supreme Being. It is

[9] *The Life and Works of John Adams* (Boston, 1856), vol. 10, p. 415. This was letter of January 23, 1825.

[10] Id. vol. 10, p. 43 (letter of June 28, 1813).

[11] State v. Mockus, 113 Atl. 39, 44.

recognized in preambles to constitutions, and in statutes relating to oaths. The framers of the Federal Constitution took care not to do even that much. The word "God" nowhere appears. It could have been, but was not, placed in the form of the presidential oath of office. It could not have been, therefore, only a *Church* Establishment which the founders of our Government sought to prevent. They wanted, as Justice Rutledge observed, "a complete . . . separation of the spheres of religious activity and civil authority." [12]

James Madison knew what sufferings had been imposed on individuals by tyrants intending to compel profession of belief in particular doctrines. In Fuller's *Church History* Bartholomew Legate is spoken of as a person "of bold spirit, confident carriage, fluent tongue, excellently skilled in the Scriptures." Legate was brought before James I, and because he had not "prayed to Christ" the king "spurned at him with his foot." It pained Fuller to recite the thirteen heresies of Legate. The historian's preface is:

> Before we set down his pestilent opinions, may writer and reader fence themselves with prayer to God against the infection thereof; lest, otherwise touching such pitch (though with but the bare mention) defile us, casually tempting a temptation in us, and awakening some corruption which otherwise would sleep silently in our souls. . . .

Legate was burned April 11, 1611, "for being guilty of that Unitarianism."[13]

Madison knew the Deism of Jefferson, Washington, Adams, Franklin, and others, and probably concurred in it. He never failed to co-operate with Jefferson in any effort to separate religion from government. Madison as a politician was sometimes required by political expediency to be silent, but in the closing years of his life he was free to say, and did say, that "the establishment of the chaplainship to Congress is a palable violation of equal rights, as well as of Constitutional principles." [14]

It may be that John, Bishop of London, when causing the burning of Legate was acting for the established church, but

[12] 330 U. S. 1, 31, 32.
[13] Hale v. Everett, 53 N. H. 7, 218.
[14] Madison, *Detached Memorandum*, as cited in note 12 in 330 U. S. 12.

Madison knew that in America the danger was that all or a majority of sects would join in punishing what Justice Black referred to as "expressions of non-belief in their doctrines." [15] Under the blasphemy laws *any* person could complain to the prosecutors. Kentucky never had an established church, but in 1894, on the theory that the common law of England was surviving, a Grand Jury indicted C. C. Moore for blasphemy on the complaint of a Methodist clergyman. In several states there are constitutions which disqualify non-believers for public office, a situation not created by any *one* church but by religionists from many sects. Madison and his friends made sure that the Federal Government would never impose such legal disabilities, and so the Constitution provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Of course, religious politicians would, if they could, weaken the First Amendment so as to let in "religion" in some sense. Religious authors would weaken it by comment, and judges by opinions. Whatever verbiage they left behind did not deceive our Supreme Court when it considered the *Everson* and the *McCollum* cases, or when it decided the earlier cases involving freedom of Jehovah's Witnesses.

It was not the established church but Presbyterian members of the House of Commons who, citing passages from Leviticus and Deuteronomy, "as though these formed a part of the Statutes at large," [16] proposed that Nayler, the Quaker, be put to death.[17]

In 1774, after he had completed a post-graduate course in Christian Evidences, Madison wrote in a letter the following:[18]

> That diabolical, hell-conceived principle of persecution rages among some. . . . There are at this time in the adjacent county not less than five or six

[15] 330 U. S. 1, 9.

[16] William C. Braithwaite, *The Beginnings of Quakerism*, 241 et seq.

[17] 5 Howell's *State Trials* 801. Mr. Boston once cited Lev. XXIV, 11, 12, 23, on "the son of the Israelitish woman" who was not, after being stoned to death, "ever a further problem." 51 Am. Bar Assn. Rep. 715.

[18] Letter of January 27, 1774, to William Bradford, Jr. Quoted in part by Horace H. Hagan, "James Madison: Constructive Political Philosopher," 16 *Am. Bar Assn. J.* 51 (1930).

> well-meaning men in close jail, for publishing their religious sentiments, which in the main are very orthodox. . . . I have squabbled and scolded, abused and ridiculed so long about it, that I am without common patience. . . .

Madison would have been indignant over the imprisonment of men not "orthodox" at all. He it was who invited Harriet Martineau, "an atheist in the regular sense," [19] to visit him at his home in Montpelier, Virginia.[20] He would have objected to the imposition of any kind of penalty upon Jefferson for the latter's words to James Smith:

> The hocus pocus phantasm of a God, like another Cerberus, with one body and three heads, had its birth and growth in the blood of thousands and thousands of martyrs.

Jefferson in his letter to Dr. Woods was far from orthodox when he said:

> I have recently been examining all the known superstitions of the world, and do not find in our particular superstition one redeeming feature. They are all alike, founded upon fables and mythology.

If Madison believed differently from Jefferson, there is no evidence of the fact. His *Remonstrance* was, in effect, against governmental recognition of one or more of the Christian doctrines by compelling taxpayers to pay the teachers of such doctrines. Jefferson objected to religious instruction by any state agency. The Rev. John S. C. Abbott, historian, wrote of him: [21]

> Having no religious faith which he was willing to avow, he was not willing that any religious faith whatever should be taught in the University as part of its course of instruction.

Because of "a general cry of disapproval" (which must have been on the part of the clergy) he acquiesced in permitting sects to maintain their own schools on University property.[22]

[19] See her autobiography.

[20] Harriet Martineau, *Retrospect of Western Travels.* See also *Enc. Brit.* (11th ed.), title "Madison, James."

[21] Abbott, *Lives of the Presidents,* 142. As quoted by Steiner, *The Religious Beliefs of our Presidents,* 104.

[22] See full text of Jefferson's letter to Dr. Thomas Cooper, dated Nov. 2, 1822, cited in note 11 of Justice Reed's opinion in 333 U. S. 246.

The *Remonstrance* was not an objection to assessments for the benefit of one *church*. Some say the objection was to assessments "for the exclusive benefit of one *religion*." So it was, but the one religion was Christian, and that term comprises *all* the Christian sects. It would be impossible to confer a "benefit" on all groups equally, for to aid Fundamentalism would hurt the Modernists. To aid any doctrine peculiar to Christians would discriminate against Jews and non-religious persons. But it would be possible to treat all groups, and all individuals, equally by refraining from giving official recognition to a doctrine or doctrines of any one of them, and make it the law that "neither a state nor the Federal Government can . . . aid all religions." [23]

Paragraph 5 of the *Remonstrance* declared:

> Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an erroneous pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

The truth was sugarcoated to reduce opposition of the religionists. The sop thrown to them was the concluding clause. Deists like Franklin, and Madison himself, were not privately interested in "the means of salvation." The preceding clauses are of vital importance. The principle was revived and applied in the *McCollum* decision, after having been violated by the school board. The board had acted, in effect, as "a competent judge of religious truth" when it authorized doctrinal instruction which accords with teachings of particular sects but contradicts Jefferson's statement that Jesus "endeavored to bring them [Jews] to the principles of pure deism." [24]

The complaint in the *McCollum* case alleged that one of the instructors taught that God and a female person were the father and mother of a male child.[25] Madison would have objected to the teaching of that "religious truth" in the name of the people and of the government, or to the teaching of any hypothesis of

[23] That is now the law under the McCollum decision.
[24] *The Life and Works of John Adams*, vol. 10, p. 54, 55, quoting Jefferson.
[25] Note 16 in 62 *Harvard Law Review* 1311.

theology by a State agency. People not only deny doctrines, but wish to prove that reason is on their side. Hence Madison and others fortified the first clause of the First Amendment by adding, after a semi-colon, the clause insuring freedom of speech. They knew that speech had not been free to those who denied the verity of doctrines held by "the civil magistrate" or ruler. The First Amendment could not, at first, affect state action. Hence John Adams was able to see that Massachusetts remained ready to impose "fine or imprisonment for adducing any argument for investigation into the divine authority of those books" (of the Bible).[26]

The religionists were not greatly interested in the First Amendment, when adopted, for they were obtaining abundant aid from the separate states. Accordingly Dr. Robert Baird gleefully wrote to the effect that governments are "Christian" because the states do not allow atheists to testify.[27] Madison voted for the Act, in the First Congress, which permitted an Atheist to be a Congressman by the provision that he could make *affirmation* instead of an oath. On the chaplainship matter, silence was expedient, and where chaplains were placed in the army, the motive was to accommodate the soldiers rather than to aid religion officially.

Madison's proclamations concerning days of prayer were issued only on "request" of Congress, and in fixing a day he used the words "I do therefore recommend." [28]

Prior to the adoption of the First Amendment there was already, with respect to the Federal Government, such "a complete . . . separation of the spheres of religious activity and civil authority" as to forbid "every form of public aid or support for religion." The First Amendment only made that situation clearer. It is contended that there is "not a scrap of evidence" to support the words quoted above from Justice Rutledge in the *Everson* case. The evidence is necessarily circumstantial, but there is much of it. The reader may draw his own inferences from the absence of the

[26] *Supra*, note 9.

[27] Baird, *Religion in America*.

[28] Proclamations of July 9, 1812, July 13, 1813, and Nov. 16, 1814, in Richardson's *Messages and Papers of the Presidents*.

word God from the Constitution, and the prohibition against religious tests. At the time of the First Amendment many states outside of Virginia supported religion by silencing opposition to doctrines common to all or many sects. Pennsylvania made it criminally punishable for one to say "The Holy Scriptures are a mere fable." [29] The state also recognized the Devil, for indictments recited that the person accused had been "moved and seduced by the instigation of the devil." [30] If Maryland had abolished its death penalty for Unitarianism, as provided in its "toleration" act of 1649, it still retained a blasphemy statute.[31] We have already referred to the Massachusetts statute which John Adams denounced.[32]

Justice Rutledge's holding that the First Amendment creates "a *complete* separation" between government and religion has the support of practicalness, which is some evidence of the legislative intent. Otherwise one small breach in Jefferson's "wall of separation" would lead to greater ones, and to discriminations against, and finally to oppressions of, various modernistic and non-religious groups. That is what history suggests, if it does not also prove.

Madison could not have overlooked the foregoing considerations. He could have regarded governmental aid to religion as either tyranny or bad policy, or both. Justice Morton in the *Kneeland* blasphemy case in Massachusetts [33] spoke from the standpoint of an orthodox Christian when he said:

> These essential and all important truths are too deeply rooted and have too strong a foundation, to need or admit of the fallacious and dangerous aid of human legislation.

Solicitors of State aid do not agree with Justice Morton, and clamor for aid and more aid. Their legal supporters assail the

[29] Updegraph v. Com., 11 S. & R. 394.
[30] *Ibid.*
[31] In Ann. Code of 1924, it was sec. 24, Art. 27.
[32] *Supra*, note 9.
[33] Com. v. Kneeland, 20 Pick. 206, 236.

McCollum decision, and predict that it "may be . . . regretted in the future" and involved "a fundamental principle . . . of our civilization and way of life." [34] The particular doctrines it is desired to protect, such as Hell or the Holy Ghost, are not specified. Without human legislation, censorship, and constant preaching many of the doctrines would be generally discarded, as they were by Jefferson, and as they are by modernists of today, and by most non-church members.

A valuable article has appeared in the Atlantic Monthly which called attention to several state cases where Catholic litigants sought to eliminate sectarian religion from public schools.[35] In a reply, elsewhere published, it was said that such cases were not based on the First Amendment. The fact remains, however, that the cases are pertinent on related points, and have been discussed in various parts of this book. In one case, there was involved a provision in the Louisiana constitution that ". . . no law shall be passed respecting an establishment of religion." [36] A Catholic plaintiff pleaded that a reading of the Bible in the public schools "is an establishment of religion" within the meaning of the Louisiana constitution. Two Jewish plaintiffs joined in the complaint. The court upheld them, declaring that the state constitution "seeks to establish equality and freedom in religious matters." That made the decision too ambiguous for one to say it favored the litigant's theory of establishment being prohibited. In Illinois there was a decision that did practically adopt that theory, for it held that "the free enjoyment of religious worship includes freedom not to worship." [37]

As explained in Chapter II, religionists sought to amend the preamble to the Virginia Statute so that it would recognize Jesus Christ as "the holy author of our religion." The offered amendment was rejected in order that *all* persons remain "within the mantle" of the freedom proposed to be established. Madison said

[34] 34 A. B. A. J. 482, 483 (June, 1948).
[35] Agnes E. Meyer, *The School, The State, and The Church*, 182 Atl. (Nov., 1948, p. 45).
[36] Herold v. Parish Board, 136 La. 1034, 68 So. 116 (1915).
[37] Peo. ex rel v. Board, 245 Ill. 334, 92 N. E. 251, 252 (1910).

that the defeat "was a rebuke for profanation of a holy name, by using it 'as a means of abridging the natural and equal rights of all men.' " [38]

No plan for religious instruction in public schools, or through them, can be constitutional. The chief reason is that no plan can place nonbelievers in the divinity of Christ on an equality with believers. There can be instruction *about* religion, for that would be a branch of history, and might also reach a field of psychology.

Some writers have ridiculed our Supreme Court for stressing the significance of Jefferson's words "wall of separation," etc., instead of speaking entirely of the words of the First Amendment. But Jefferson used his words as the exact equivalent of the "establishment of religion" phrase. Perhaps our Court would have stood on even firmer ground if, instead of borrowing a metaphor from Jefferson's letter to the Danbury Baptists, it had read the First Amendment in the light of Madison's "Detached Memorandum" and particularly that paragraph thereof which reads as follows: [39]

> Strongly guarded as is the separation between religion and government in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history: [See frontispiece for photostatic copy of this declaration in Madison's handwriting.]

Madison next refers to his Presidential vetoes of proposed aids to religion, and adds: "See also attempt in Kentucky, for example, where it was proposed to exempt Houses of Worship from taxes." President Grant could have been acting on Madison's view in

[38] See Irving Brant, *James Madison, the Virginia Revolutionist* (1941), cc. XII and XV.

[39] "Aspects of Monopoly One Hundred Years Ago, a hitherto unpublished Essay by James Madison with an Introduction by Gaillard Hunt, Chief of the Division of MSS., Library of Congress," 128 *Harper's Magazine* 489 (March, 1914). Madison's Essay is found also in Elizabeth Fleet, "Madison's 'Detached Memoranda,' " Vol. 3 (series 3), *William and Mary Quar.* (Oct., 1946), pp. 534-568. The Essay is cited by the court in the Everson case in notes 12 and 13 at p. 12 of 330 U. S. The manuscript of the Madison memorandum is now in the Library of Congress at Washington, D. C., among the papers of William C. Rives, an early biographer of Madison.

making his, Grant's, declaration in a message to Congress where he said: [40]

> I would suggest the taxation of all property equally, whether church or corporation.

Madison was referring, of course, to *all* the relevant Constitutional provisions, including those for a non-religious affirmation by the President (Art. 2, sec. 1) and the prohibition of any religious test (Art. 6), and the First Amendment, the most important of all. He did not use the word "church" nor the term "wall." So we have his clear and unmistakable language as follows:

> Strongly guarded . . . is the separation between religion and government in the Constitution. . . .

[40] Message of 1875, IX Messages and Papers of the Presidents (1897), 4288-4289. Cited by Justice Rutledge in 330 U. S. 1, at p. 61.

CHAPTER V

McCOLLUM DECISION ACCORDS WITH "EQUAL PROTECTION" CLAUSE

SECTION 1 of the Fourteenth Amendment provides, among other things, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Members of every Christian sect are already so protected by the law that they need not listen to expositions of the tenets of Jehovah's Witnesses. The believers are assured that no one can "require another to accept religious belief thrust upon him against his free will." [1] The same assurance belongs, but is not given, to nonbelievers. Most of them are coerced into pretending to believe some proposition of a theological nature—if not expressed verbally, then by silence.

Justice Jackson, concurring in the result in the *McCollum* case, raised the question whether religious instruction in public schools denies, in effect, to nonreligious pupils the "equal protection of the laws." He said:

> . . . it may be doubted whether the Constitution . . . can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.

The statement contains some false analogies. There is no hatred that goes with ridicule of one for his "dress," or for his "behavior," or for his "politics," but "nonconformity . . . in religion" results in penalties far more oppressive than mere "embarrassment."

Nonreligious people appeal more to the "equal protection"

[1] Peo. v. Dale, 47 N. Y. S. 2d. 702, 708.

clause of the Fourteenth Amendment than to the "establishment" clause of the First. "Religion" is already "established" in some way that they do not suffer additional burdens from the mere invasion of a school room by an evangelist. He teaches nothing new. But he assembles the children already pre-taught in his doctrines. The non-religious pupil is discovered, and in a sense is "exposed" as if he had been theretofore secretly a criminal. His nonconformity causes both him and his parents to undergo whatever persecutions the majority chooses to inflict. The highest court of Connecticut once recognized religious psychology enough to say that for a citizen to be known as an "infidel . . . can scarcely fail to deprive him of the esteem of mankind, . . . and render him odious and detestable." [2] That was said in 1820, and a few years later the eminent Charles Sumner (1811-1874) found it expedient not to reveal, publicly, a nonbelief in some of the prevailing doctrines.[3] Law books have preserved the dictum of Lord Coke that between nonbelievers "as with the Devil, . . . and the Christians, there is perpetual hostility, and can be no peace." [4] President Taft, a Unitarian as distinguished from a Christian, escaped hostility. Times, or rather tolerance, had improved.

It was one time conventionally considered a juvenile offense for a youth to admit an intellectual departure from the "religion of his mother." Justice Brewer, famed for his dictum in the Holy Trinity Church case, in his own book publicly insulted or ridiculed a heretical "sophomore" by sarcastic allusions to "the first dark shadow of a coming mustache." [5] Nothing was ever said of or against the occasional practice of a groom giving up the religion of his mother and adopting that of the bride.

In an item published after the state court ruled against Mrs. McCollum it is said that her son "had to be withdrawn from the school. . . . Time and again his schoolmates tore his clothing. . . . With cries of 'atheist,' they taunted him. . . ." [6]

[2] Stow v. Converse, 3 Conn. 325, 342 (1820).
[3] I *Memoir and Letters of Charles Sumner*, 117-9.
[4] Quoted in Hairn v. Bridalut, 37 Miss. 209, 226 (1859).
[5] Brewer, *The United States a Christian Nation*, 80.
[6] 74 *The Truth Seeker* 90, reprinting *Times-Union* (Rochester, N. Y.)

If the above mentioned press report was true, the probabilities are that the attacking mob had never been informed that the Revolutionary hero and patriot, Ethan Allen (1737-1789), was the author of the anti-Christian work entitled *Reason, the Only Oracle of Man*. The experience of young Terry McCollum may have been such as to confirm the truth of the following statement in an older Illinois case: [7]

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated.

A long quotation to the same effect appears also in a Louisiana case, and the declaration there was made for the protection of Catholic pupils.[8] In view of the friendship pact evidenced by the Conference of Christians and Jews, it is now the "Atheist" pupil that is in need of the "equal protection of the laws." His parents have not been invited to the Conference. Jefferson, if living, would also be barred. So would the poet Shelley, who claimed that belief is involuntary and not a matter of choice. That claim cannot be disproved, yet preachers have cried out against Rationalists, actual or hypothetical. One advised young women to "beware of the man who . . . repudiates Christianity. . . . He is unworthy of your hand. He ought to be beneath your respect; he deserves social ostracism." [9]

The hatred which professional evangelists have against the unconvinced is not ended by the death of the adamant Jefferson. Words which injure his memory creep into even a biographical sketch in an encyclopedia.[10] So far as concerns Stephen Girard,

article of Feb. 19, 1947, which was headed: "Boy Transfers to School Here to Escape 'Atheist' Taunts."

[7] Peo. v. Board, 245 Ill. 334, 92 N. E. 251, 256.

[8] Herold v. Parish Board, 136 La. 1034, 68 So. 116, L. R. A. 1915D 941, Ann. Cas. 1916A 806.

[9] 37 *The Truth Seeker* 452 (July 16, 1910), quoting a "preacher."

[10] See *Chambers' Enc.*, title "Girard."

who died in 1831, the Mayor of Philadelphia in 1898 admitted: [11]

> After his (Girard's) death . . . the statement that he had no religious faith . . . tended to blind the judgment and to darken the truth . . . but now we know him in his true light.

Girard was "a skeptic" [12] who "despised her (his mother's) religion." [13]

The name of Thomas Paine is now enrolled in the Hall of Fame for Great Americans.[14] In files of old religious periodicals there are statements of and concerning Paine and to this effect: [15]

> . . . a wretch without a character, overshadowed with crime, devoted to the most bestial intoxication, the enemy of all morality, and a besotted Infidel.

Paine's friend, President James Monroe, took the precaution of remaining reticent.[16]

History and human experience, samples of which have just been given, support Judge Hines in his carefully considered opinion to the effect that the constitutional rights of "deists, atheists, and agnostics" [17] are violated by an ordinance which requires prayer and the reading of the Bible in the public schools. He was dealing with that provision of the Georgia constitution which says that "no inhabitant . . . shall be molested in person . . . on account of his religious opinions."

[11] Speech at the proceedings of the Semi-Centennial (1898) of Girard College, Jan. 3, 1898, edited by Geo. P. Rupp.

[12] *Chambers' Enc.*

[13] Elbert Hubbard, *Little Journeys to the Homes of Great Business Men* (1909), p. 82, 86.

[14] *World Almanac* (1948).

[15] Irving Levy in 58 *The Truth Seeker* 4 (Jan., 1931), quoting from *The Balance and Columbian Repository.*

[16] "The habit of reticence or dissimulation among American public men was only too surely confirmed by the treatment meted out to Paine . . . Madison and Monroe, the latter Paine's personal friend, seem to have been of his way of thinking, though the evidence is scanty." J. M. Robertson, *A History of Freethought in the Nineteenth Century*, vol. 1, p. 57.

[17] Dissenting opinion in Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334.

It has been judicially determined that for school authorities to compel children of Mexican ancestry to go to separate buildings for secular instruction would be in violation of the equal protection clause of the Fourteenth Amendment.[18] The constitutional principle there enforced would be even more offended against if the same children were placed in, or permitted to go to, separate rooms for religious instruction. In the case last cited, Mendez v. School District, the children were segregated because of imperfect pronunciation of words in English, a circumstance that did not invite hostility against pupils of Mexican ancestry, but if the same pupils had been set apart as a non-religious, or even as a sectarian, group they would have suffered more, both constitutionally and as a matter of fact. Oppression by segregation has been noticed by courts in the school cases previously cited.[19]

The State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to patriotism and love of country." [20] But for the reason, among others, that "to many it is deeply distasteful to join in a public chorus of affirmation of private belief," [21] it is unlawful, because unconstitutional, to teach patriotism by forcing pupils to participate in the flag salute.[22] Even if compulsion is not required, the principle remains operative, for the nonparticipating pupil would be noticed, and persecuted. The foregoing considerations explain why it is injurious, if not also unlawful, to coerce a pupil into a classification of some kind with respect to the religion or secularism of himself or parents.

There is nothing in a refusal to salute the flag in peace time to incite persecution, but nonparticipation in a public recognition of religious doctrines does incite hatreds by the devout. It ought not to be so. One unashamed of his faith ought not to

[18] Mendez, Westminster Sch. Dist. (Cal.), 64 F. Supp. 544.

[19] Peo. ex rel v. Board (Ill.), *supra*, note 7. See also Knowlton v. Baumhover, 182 Ia. 691, 166 N. W. 202 (1918).

[20] Board of Education v. Barnette, 319 U. S. 624 (1943).

[21] Murphy, J., in Board v. Barnette, supra, note 20, at p. 645.

[22] Supra note 20.

be indignant toward others who do not have the same beliefs. Furthermore, he ought to be willing to let his doctrines survive on their own merits, and not insist that the government aid them by a series of recognitions. Fundamentalists can observe Good Friday, for example, without the aid of official proclamations or a legal holiday that tend to coerce the disinterested people into silent acquiescence which gives the appearance of agreement with the doctrines officially recognized. Nonaction by a State will not hurt the truth in a truthful theology. On the other hand, partisan aid only insults the victims of discrimination.

Once a prisoner in a penitentiary was punished for refusal to attend chapel service. Thereafter a citizen, on the outside, appealed to the Board of Control to abrogate the rule of compulsory attendance, and at the same time argued that the state had no right to collect a tax from him to pay the salary of the chaplain in the penitentiary. The result of the protests was only the publication of a legal opinion to the effect that "the state owes an obligation" to the prisoners to give them the "benefit" of the chapel exercises.[23] The *McCollum* decision exposes the weakness of that kind of opinion. This is not overlooking the fact that most criminals want the alleged "benefit," having had religious beliefs and benefits prior to their conviction. The point is that the benefits should be paid for by others than taxpayers. The further point, regarding coercion, is suggested also by the Code of the District of Columbia which provides for giving "fixed habits of religion" [24] to boys in a public institution.

Assailants of the *McCollum* decision toss about slogans relating to "the democratic conception of our society." The conception in question was not overlooked. Justice Frankfurter himself used the phrase above quoted when upholding the flag salute regulation as applied against children of Jehovah's Witnesses.[25] He did not fail to say, in the same case:

[23] 41 *The Truth Seeker* 136 (Feb. 28, 1914), referring to the board's opinion as being published in the *Lincoln Daily News* of Feb. 11, 1914.

[24] Prof. Sutherland, "Due Process and Disestablishment," 62 *Harvard Law Rev.* 1306, 1328 (June, 1949).

[25] *Supra* note 20.

> If the avowed or intrinsic legislative purpose is either to *promote* or to discourage some religious community or *creed*, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. . . .
>
> The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's *support* or incur its hostility. Religion is outside the sphere of political government.

Mohammedanism never sought support here; the Christian religion did, and got it. Usually it acted through some strong sect, or a combination of several.

It was probably a combination of leaders of a few denominations that brought about the released time program in the Champaign schools. Some of the supporters of such leaders have raised the cry that the *McCollum* decision deprived the Champaign "people" of the right of "free exercise" of religion. The only "exercise" affected by the final judgment was the exercise attempted in the name of a governmental agency. Worship is ordinarily carried on, as it ought to be, in the name of the worshiper. Likewise proselytism should be practiced by and in the name of the actual proselytizer. Madison, too, so thought when saying that "the establishment of the Chaplainship to Congress is a palpable violation of . . . Constitutional principles."

Jefferson's declaration that he was "for preserving to the states the powers not yielded by them to the Union," is no longer relevant to the First Amendment, the "states" having ratified the Fourteenth Amendment.

Jefferson's consent that private religious schools use the grounds of the University was dictated by expediency, as may be inferred from his letter to Dr. Thomas Cooper. He took advantage of the opportunity of "bringing the sects together, and mixing them with the mass of other students . . ." "Mixing" is exactly what sectarians refuse to practice.

Like Madison and Monroe, Jefferson would not needlessly arouse religious hostility. Silence was expedient. Hence he expressed himself in private letters to John Adams and other friends. A jurist has summarized Jefferson's opinions by quoting the latter to the effect that Jesus endeavored to bring the Jews

"to the principles of a pure *deism*." [26] As President he would not, officially, recognize any doctrine, not even his own Deism. He argued against the validity or truth of the pretended maxim that "Christianity was a part of the common law of England." [27]

There is, under the "released time" practice, an unconstitutional discrimination against members of such sects as are not represented on the teaching staff. The Champaign plan did not provide for instruction in doctrines which are preached only by Jehovah's Witnesses, or for explaining the ideas of Mrs. Eddy's Christian Science. The Seventh Day Adventists were also ignored.

Any religious lesson sponsored by a governmental agency is a boast or exercise of power by the groups whose doctrines are being officially noticed. That offends other citizens, because the State action implies that the doctrines favored are true and those inconsistent therewith are false. The discrimination is obvious. It follows that the courts were just, and right, where they upheld the contention, on behalf of Catholics, that it would be unconstitutional to compel all pupils to attend readings from Protestant versions of the Bible. If any litigant complains of an infringement of his constitutional right to be free from molestation on account of faith or reason, presumable infringement there is, for oppression of any kind is most clearly perceived and understood by its victims. They feel the pain. The oppressors, on the other hand, suffer nothing, and may pretend even to be unaware of the injuries inflicted.

[26] Doe, J., in Hale v. Everett, 53 N. H. 9, 922.
[27] Referred to in State v. Chandler, 2 Harrington (Del.) 553 (1839).

CHAPTER VI

GOVERNMENTAL CENSORSHIP IN AID OF RELIGION

ANOTHER practical result of the *McCollum* decision is to bring within the prohibitions of the First Amendment all future legislative, judicial, and official censorship of writings that oppose religious doctrines of the favored sects. Dr. James Rush was the third son of Dr. Benjamin Rush, the contemporary and friend of Jefferson. In his will Dr. James Rush devised most of his estate for the establishment of a library, and provided: [1]

> I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subject of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency.

In an action to invalidate that gift it was charged, and the court agreed, that the clause above quoted "compelled the admission of books inculcating rebellion, treason, deism, and polygamy, which would be subversive of religion." Thus again the defenders of religion would associate the word "deism" (equivalent, practically, to present-day Unitarianism) with opprobrious subjects like "treason." The court did likewise for it held that if Dr. Rush had expressly directed the inclusion of Deistic works the will would be void because—

> It may be regarded as settled in Pennsylvania, that a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government.

[1] Manners v. Library Company, 93 Pa. St. 165 (1880).

Thus not only Harriet Martineau's "atheism" but also Jefferson's "infidelity" are tossed into the category of "immorality." The court carried on the propaganda that Unitarianism and any further departure from the doctrine of the Trinity is near-criminality or a psychopathic state of mind. Jefferson himself said: [2]

> In truth, the alliance between Church and state in England has ever made their judges accomplices in the frauds of the clergy, and even bolder than they are: . . .

In 1887 an English court invalidated a gift to Charles Bradlaugh and George Payne on the ground that Mr. Bradlaugh would probably use the money in aid of his own secular views. On that ground the executors were required to withhold the fund from the designated beneficiaries.[2a]

Judicial suppression of free investigation of the origin and verity of theological doctrines was practiced, not as in aid of an established church but because the Christian doctrines were treated as if made axiomatic by law. That would make Jewish doctrines outlawed, and the courts acted accordingly. They invalidated bequests for the Jewish religion because the intent of the testator "must be taken to be in *contradiction* of the Christian religion, which is a part of the law of the land, . . ." [3]

In Pennsylvania, the will of Levi Nice provided that real estate "shall go to and be held . . . by the Infidel Society of Philadelphia . . . and to be held . . . for the purpose of building a hall and for the free discussion of religion, politics, etc." The court said that a "hall" so "desecrated . . . for the free discussion of religion" would— [4]

[2] Appendix to Reports of Cases, etc., by Thomas Jefferson. Quoted in Steiner, *The Religious Beliefs of Our Presidents*, 107.

[2a] 57 L. T. Rep. (N. S.) 519; *National Reformer*, 1887, p. 58, 104, 106, 298; Bonner, *Penalties Upon Opinion*, 97.

[3] In re Bedford Charity, 2 Swanston 532; 36 Reprint 696, 716. See also De Costa v. De Paz, Ambler 228, 27 Reprint 150.

[4] Zeisweiss v. James, 63 Pa. St. 465. The privileged class libel in the quotation has a book-length answer in *Religion and Crime*. Bogert in a supplement to his work on Trusts cites this author's article, "Judicial Invalidations of 'Infidel' Wills and Trusts," 3 *Kansas City Law Review* 12.

> . . . prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel . . .

The will was invalidated, and the case is still cited as law in works on wills and trusts. The court did not wait, in the matter of suppressing speech, until an actual "free discussion of religion" had taken place.

It was decided in England (in absence of any statute resembling Jefferson's Virginia statute) that a landlord could cancel a contract to rent a hall for Secular lectures where the intended discussions would be of the following subjects:

1. The Soul: Its Nature and Destination.
2. The Character and Teachings of Christ; the former Defective, the latter Misleading.
3. Bible Morality and Bible Science.
4. The Skeptical Tendency of Bishop Butler's *Analogy*.
5. The Bible shown to be no more Inspired than any other Book, with a Refutation of Modern Theories thereon.
6. Catholicism, Protestantism, and Secularism; which contains most Truth, and which is best calculated to benefit Humanity.

The secretary of the Liverpool Secular Society hired the hall (St. Anne's Assembly Rooms) for the delivering of the lectures and for holding a tea-party to commemorate the birthday of Thomas Paine. The landlord at the instance of the chief constable refused to permit the lessee to use the rooms. In subsequent litigation the court upheld the cancellation of the contract, using the old formulas and referring to a statute which made it criminal to deny that the Old and New Testament are of "divine authority." [5] The result was, not punishment for lectures already delivered, but a prevention of any one of them, a *previous restraint* on speech, which reminds one, of course, that in our

[5] Cowan v. Milburn, *Law Reports*, 2 Ex., 230; 36 *L. J. Ex.*, 124. Newell in *Slander and Libel* (2d ed.) 952, remarks that "the propositions intended to be maintained in them (the lectures) could hardly have been expressed on the placards in less offensive language."

The advertised lecture on Bishop Butler's *Analogy* was entitled exactly as an essay written in 1859 by Sara Hennell. It did have a "skeptical tendency." Moncure Daniel Conway, *The Writings of Thomas Paine* (1899), v. 4, p. 259.

country such previous restraints would be in violation of the free speech clause of the First Amendment.

In 1903, in England, a court nullified a bequest to the Oldham Secular Society for "the spread of Secular principles as the Oldham Society might from time to time direct," and that ruling was made in spite of the Attorney-General's contention that the bequest was a charitable and a legal one.[6] In 1907, in South Australia, a case arose involving a bequest to the "Incorporated Body of Freethinkers of South Australia." The Society had ceased to exist, but the court held that if such fact did not intervene, still the legacy would not be enforced.[7]

To deny a "blasphemous" book the benefit of a copyright could be to increase its circulation, yet it was done.

Norman Moore, M.D., in vol. 32, p. 286, of the *Dictionary of National Biography* (England), writes of Sir William Lawrence, the eminent British surgeon, who published in 1819 his *Lectures on Physiology, Zoology, and the Natural History of Man,* and informs us that contemporary theologians discerned in these lectures, which had originally been delivered at the College of Surgeons, "an attempt to undermine the foundations of religion." Lord Chancellor Eldon refused to give the book the legal protection of a copyright, and dissolved an injunction previously granted to restrain piracy of the work. The court said: [8]

> Looking at the general tenor of the work and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction.

Lord Eldon's opinion was remembered in San Francisco nearly 80 years later when a court cited it, probably after counsel had, in considering whether to hold a song morally objectionable on account of its containing the line: "She's the hottest thing you

[6] Bonner, *Penalties Upon Opinion* (1913), 100.
[7] Bonner, supra, citing Melbourne Argus, Dec. 25, 1907, and Jan. 14, 1908.
[8] Lawrence v. Smith, Jac. 471.

ever seen." [9] The question of a right to a copyright was involved. An 1819 suspected heresy was treated on the same footing as an 1898 obscenity, or *vice versa*, a point that ought to interest modernistic clergymen.

In 1823 an injunction to protect property rights in Lord Byron's *Don Juan* was dissolved, and earlier there was a like proceeding as to the drama *Cain* on the supposition that "the blasphemy of the scenes was Satanic." [10] Relying on such decisions, an orthodox missionary sought to justify the piracy of Mr. Page Hopps' *Life of Jesus*, a Unitarian book, on the theory that it, too, was a blasphemous publication.[11]

In 1846 it became legal to promote Unitarian Christianity,[11a] but prior to that time it was not, for Unitarianism was far from conforming to the legal definition of "Christianity." [11b]

The Christian emperors of Rome acted directly in aid of the Church, as illustrated by the special order of Theodosius II for the destruction of the writings of the emperor Julian who, having been educated as a Christian, was qualified to explain why he thought it better to restore Paganism than to maintain the Church established and enriched by Constantine.

Not all demands for governmental censorship in this country have been granted. In 1914 the House of Representatives defeated, after having allowed many hearings, a bill for the exclusion from the mails of "any publications which are, or which are represented to be, a reflection on any form of religious worship practiced or held sacred by any citizens of the United States." Such a law would violate Madison's principle that no public official or "magistrate" usurp the power of deciding what is "religious truth." Moreover, under the law then proposed the post-

[9] Broder v. Music Co., 88 Fed. 74, 78 (1898).

[10] Note to Lawrence v. Smith (1822), Jacob 471. Sec. 893 Joyce on Injunctions, citing Copinger's Copyright (3d ed.) 93. The "Cain" case was Murray v. Benbow (1822) mentioned in Bowman v. Secular Society, Ann. Cas. 1917D 761, at 767.

[11] Bonner, *Penalties Upon Opinion*, 51, citing Odgers, *Libel and Slander*.

[11a] Shrewsbury v. Hornby, 5 Hare 406.

[11b] Attorney General v. Pearson, 3 Merivale, 353, note. See note "A Court's Proscription of Scientific Works," 20 *Georgetown Law Journal* 382 (Mar., 1932).

master general could discriminate in favor of his own or the most powerful denomination and prevent weaker groups from discussing in mailed matter the origins and verity of doctrines "held sacred" by some believers. There might be a "reflection" by arguing "evolution," for a mayor of a southern city once notified Charles Smith that "no headquarters for distribution of Evolution tracts can be established." [11c]

Communism, which also has some inclination toward censorship, is being fought with the question "What do Communists do with non-Communist books and those who sell or own them?" (34 A. B. A. J. 698). We are told they do worse than what the Philadelphia constabulary did to Jefferson's bookseller Nicholas Dufief. Censorship like poison is such *per se*, in any hands, and it invites the question: What have governments in aid of religion done with historical or secular books that tend to discredit specific theological doctrines? In 1945 a Collector of Customs in New York seized for detention 20 copies of *The Bible Handbook*, 20 copies of *Papacy in Politics Today*, and copies of "The Freethinker," a periodical published in England for more than fifty years.[12] In 1895 the Canadian postmaster general barred "The Truth Seeker" from the mails, which action caused Charles A. Dana of the New York "Sun" to "revolt at the arbitrary act." [13]

Voltaire's *Philosophical Dictionary* was condemned in France in 1766 and publicly burned in the streets of Paris. But it was as late as 1909 that a Municipal Court in New York held a contract for the sale of that book void on the ground that the book was "immoral." On appeal, however, the judgment was reversed. The opinion of the appellate court was written by Justice Samuel Seabury, and some of his statements are as follows: [14]

> The Philosophical Dictionary is a collection of articles dealing with romance, history, science and religion, many of which were originally con-

[11c] The Debunker (Dec., 1928), 10.
[12] Truth Seeker Co., Inc. v. Durning, 147 Fed. 2d. 54.
[13] Macdonald, *Fifty Years of Freethought*, v. 2, p. 100.
[14] St. Hubert Guild v. Quinn, 118 N. Y. Supp. 582 (1909). See also 36 *Truth Seeker* 440 (July 10, 1909).

tributed to the great Encyclopedia of which Diderot, D'Alembert, and Voltaire were the inspiration. It is not only a reservoir of sarcasm and wit, but it has exerted a profound influence in favor of a humane and rational administration of the law.

The Justice also referred to the "illiberality of opinion" of some of the English judges, citing the case where Lord Eldon "refused to protect by injunction Southey's *Wat Tyler* until the innocent character of the work was proved . . . and expressed a doubt as to the innocent character of Milton's *Paradise Lost*."

In 1893 a Collector of Customs stationed at Amherst, Nova Scotia confiscated *Old Testament Stories Comically Illustrated* by Watson Heston, and sent a card to the addressee. In the official communication it was stated: "I have laid it aside, to be destroyed, according to instruction, as of 'indecent character.' " [15] On Nov. 3, 1890, there was a like seizure, at Napanee, Ontario, of *Freethinker's Pictorial Text-Book*.

The reason that cases of governmental book censorship are not more numerous in this country is that private censorship has been widespread and effective, a matter discussed in the next chapter. In English history the cases are too multitudinous to be here collected. A few will be mentioned as illustrative. King James I ordered the destruction of Scot's *Discoverie* because its contents tended to create doubts about the truth of what was then believed of witches and familiars. James is the King who ordered the burning of Legate, and is still remembered in and by the familiar words: "King James version." James took a deep interest not only in witchcraft but also in religious affairs in foreign lands. He sent a secret envoy to "watch the movements of the Synod" [16] of Dort (1618-1619), where at the outset Calvinists feared that "the mighty genius and fine eloquence of Episcopius might injure their cause in the view of the multitude." There was an Arminian reaction "against both the supralapsarian and infralapsarian developments of the doctrine of predestination." [17]

Somewhere in Mosheim's books may be found the information

[15] 21 The *Truth Seeker*, 101 (Feb. 17, 1894).
[16] Sec. 6, Ch. III, Book IV Mosheim, *Eccl. Hist.*
[17] *Enc. Brit.* (11th ed.) tit., "Dort, Synod of."

that Prince Maurice of Orange, a stadtholder with political ambitions, committed himself to the Calvinistic party, and under his government "the Arminians suffered . . . greatly." This is to remind that history is replete with records proving that when a ruler aided one sect he harmed another and probably wiser one, and the aid was given in the course of practical politics and not to foster correct theology.

That Arminian opinions came to England is evidenced by the fact that William Prynne (1600-1669), a Puritan pamphleteer and a member of the bar "appealed to parliament to suppress anything written against Calvinistic doctrine and to force the clergy to subscribe the conclusions of the synod of Dort." [18] It happened, however, that what was later suppressed by religionists was his own book, *Histrio-Mastix*, denouncing the stage and the "dance," which made the book "blasphemous," in view of the fact that "the Queen herself was so fond of the amusement that she had borne the part of a pastoral in her own royal person." After a trial in the Star Chamber Court in 1633, in the reign of Charles I, Prynne was fined 10,000 pounds, imprisoned for life, his ears cut off, his nose slit, his forehead branded and all copies of his book burnt. In 1637 he was again sentenced, and that time to "loose whatever stump of an ear he might have left, and to be branded on the cheek SL meaning 'seditious libeler.' "

One case of book burning deserves special mention, and is well known to Unitarian ministers. On September 6, 1647 the pamphlet *Twelve Arguments* written by John Biddle, Oxford graduate and father of English Unitarianism, was ordered to be burned by the hangman.[19] The House of Commons several times ordered particular books to be burned, e. g. Mathew Tindal's work in 1710.

In 1648 the Presbyterian Party was in control of the House of Commons, and upon the republication of Biddle's book that year they secured the passage of an act (called "ordinance") which

[18] Quotations are taken from Schroeder, *Constitutional Free Speech*, but a good article on Prynne appears in the 11th ed. of *Enc. Brit.*, title "Prynne, William." Schroeder cites 3 Howell's *State Trials*, pp. 563 et. seq.

[19] Schroeder, *supra;* see article on John Biddle in *Enc. Brit.* (11th ed.).

among other things prescribed the death penalty upon those who denied the doctrine of the Trinity. It was in the next year, 1649, that the Maryland Toleration Act became effective and with a like provision. Upon the publication of Biddle's later books the assembly of divines sitting at Westminster made their appeal to the parliament for Biddle's death. In 1650 the House of Commons ordered the imprisonment of Laurance Clarkson (or Claxton) for the publication of some book regarded as "baptist," and the book itself was burned by the common hangman. In the same year Parliament ordered the burning of the Rev. Abiezer Coppe's book. Also books written by John Fry, a member of Parliament, and it was further ordered that Fry be "disabled to sit as a Member of this House." [20]

All of the works of Thomas Hobbes were placed on the Index. His book *Leviathan* escaped destruction and about 200 years later could be, and was, read by Oliver Wendell Holmes.[21] It is still published, and respectfully treated in book reviews. But the author himself was in danger of lynching at a bee where government and church would be working together. In October, 1666, an attempt was made to revive the common law writ *de haeretico comburendo* (for burning a heretic) against him. Because of the Great Fire in London in 1666, following on the Great Plague, Christians were alarmed. The House of Commons considered a bill against atheism. "On the 17th of October it was ordered that the committee to which the bill was referred 'should be empowered to receive information touching such books as tend to atheism, blasphemy and profaneness, or against the essence and attributes of God, and in particular . . . the book of Mr. Hobbes called *Leviathan*.' " [22] Charles Blount (1654-1693) approvingly published extracts from *Leviathan*. Blount's own works suffered from religious censorship.

In 1675 Blount published *Anima Mundi* wherein he said:

[20] The authorities are collected by Schroeder in *Constitutional Free Speech*, which discusses also other cases.

[21] 31 *A. B. A. J.* 572 (Nov., 1945).

[22] *Enc. Brit.* (11th ed.), title "Hobbes."

> As the lustre of an Oriental Diamond is more clearly perceived, when compared with counterfeit Stones; so Christianity appears in its greatest Glory and Splendor, when compared with the obscurity of Paganism.

But comparisons were deemed dangerous, and so "Compton, the Bishop of London, was quick to scent the danger and ordered the book suppressed. It was subsequently publicly burnt." [23]

In 1680 Blount "translated the work of Philostratus," [24] and "this too was considered so dangerous a work that its suppression was at once determined on." [25] What Philostratus wrote was a biography of Apollonius of Tyana, and this he did at the request of the wife of the emperor Septimius Severus. Thereafter Hierocles, president of Bithynia and later praefect of Alexandria, sought to impeach the evidence which Christians derived from the stories of the alleged miraculous works of Christ; "and his aim accordingly was to develop the character of Apollonius of Tyana, as a rival to our Savior in piety and miraculous power." [26] Hierocles made use of Philostratus's writings "for the purpose of instituting a comparison between Apollonius and Christ" and to "deprive the Christian miracles of the force of evidence." [27]

"The work of Hierocles is lost," [28] as would be expected. Theologians admit that in so far as it is described "in a reply which Eusebius wrote" it was "couched in a seeming spirit of fairness." [29] Damis was the first "chronicler" [30] of the travels of Apollonius, who "was a Pythagorean philosopher." [31] The wife of emperor Septimius Severus, who ruled during 193-211, apparently wanted Philostratus to "dress up Damis's narrative" in order to pave the "way for the general reception of the story

[23] Schroeder, *Constitutional Free Speech*, 307, citing authorities consulted, including 5 *Dictionary of National Biography*, p. 243.

[24] Adam Storey Farrar, M.A., *A Critical History of Freethought* (1888), p. 64.

[25] Schroeder, supra note 8.

[26] Farrar, *supra*, note 9, at p. 62.

[27] Farrar, *supra*, note 9, at p. 64.

[28] Farrar, p. 64.

[29] Farrar, p. 64.

[30] Farrar, p. 63.

[31] Farrar, p. 62.

among the cultivated classes of Rome and Greece," so that the latter would regard the story of Christ less credible than the story of Apollonius. If the biography of Apollonius was so "dangerous" as to require suppression, even as late as the time of Blount's translation, 1680, it is easy to suspect fraud, even now, in the origin of that Trinitarianism which Unitarians and Rationalists reject. The suspicion grows by contemplation of the fact that the works of Porphyry (233-305) were destroyed through the special order of a Christian emperor, Theodosius II, in 435. Porphyry "was a man cultivated in all the learning of his age, and of a more generous temper than Celsus, and seems to have exercised much critical sagacity in the investigation of the claims of Christianity." [32] He was among the first thinkers to object to "the inscrutable mystery of an infinite punishment in requital for finite sin," [33] which was another reason for the censorship and destruction of his works.

In 1841 Edward Moxon, poet and publisher, was indicted for, and convicted of, having sold an edition of Shelley's poems containing "Queen Mab." [34] That case seems well known to students of the history of English criminal law. Mrs. Hypatia Bradlaugh Bonner mentions also that in 1823 William Clark was imprisoned for publishing "Queen Mab," and that in 1824 James Affleck was sentenced to three months' imprisonment for publishing the same poem. In *Penalties Upon Opinion*, Appendix B, mention is made of the conviction of George Houston for publishing d'Holbach's *Ecce Homo;* of several convictions for the publication of Palmer's *Principles of Nature.* There were many prosecutions for the sale of Thomas Paine's *Age of Reason,* two of them as late as 1824, the accused being William Haley and Richard Hassell. The most famous case, in that connection, is that of the bookseller Williams whose case is given many pages in 26 Howell's *State Trials.* Woolston's Case (1729) is discussed in Justice Stephen's *History of the Criminal Law* because the court made criminal the matter

[32] Farrar, p. 57.
[33] Farrar, p. 62, note.
[34] 4 *State Trials* (N. S.) 693, et seq.

and not the manner of publication. Of Woolston's six pamphlets, the Rev. Adam Storey Farrar wrote: [35]

> They were published as pamphlets; in each of which he examined a few of the miracles of Christ, trying to show such inconsistencies as to make it appear that they must be regarded as untrustworthy if taken literally; and hence he advocated a figurative interpretation of them, asserting that the history of the life of Jesus is an emblematical representation of his spiritual life in the soul of man. The gospels thus become a system of mystical theology, instead of literal history.

After Woolston came Jacob Ilive (1705-1763). In 1756 he published "Modest Remarks on the Bishop of London's several Discourses preached in the Temple Church," etc. Penalty: Committed to Newgate for one month within which to be set upon the pillory, and thereafter imprisoned for three years with hard labor in the House of Correction at Clerkenwell. In 1763 James Dixwell and Edward Cabe were prosecuted for publication of the same work involved in Ilive's case. In the same year Peter Annet (1693-1769), a deistical writer, was convicted for the publication of "The Free Inquirer." In 1797 began the series of prosecutions for the sale of Paine's *Age of Reason.*

David Hume (1711-1776) was actually as guilty of blasphemy in the sense that Woolston was as were the men convicted, but his *Inquiry Concerning Human Understanding,* was simply "answered" by Paley, Bishop John Douglas, Campbell, and Chalmers. John Stuart Mill's *Essay on Liberty* seems "blasphemous" too. It was because of the rise of Rationalism among the educated that courts changed the law of blasphemy so as to make guilt depend on whether "decent language" was used. That change began in 1883 by instructions given by Lord Chief Justice Coleridge in a case against Foote and Ramsey.

Some judges did not thereafter agree with the new judicial liberalism. Sir J. F. Stephen recognized the fact that the law as expounded by Lord Coleridge is not the law as laid down by Justice Raymond in Woolston's case. He understood that according to prior decisions— [36]

[35] *A Critical History of Freethought in Reference to the Christian Religion* (1888).

[36] Stephen in "Fortnightly Review," March, 1884.

> a large part of the most serious and most important literature of the day is illegal—that, for instance, every bookseller who sells, everyone who lends to his friend, a copy of Comte's *Positive Philosophy*, or of Renan's *Vie de Jesus*, commits a crime punishable with fine and imprisonment.

Such censorship as hereinbefore described was once desired by managements of the stronger denominations, and when the clergy realized that the Virginia Statute tended to aid Unitarian and Secular opinion, they provoked Jefferson to say, in 1802: [37]

> . . . the advocate of religious freedom is to expect neither peace nor forgiveness from them [the New England clergy].

Trinitarian instruction in public schools is a form of censorship of anti-Trinitarian matter. The persecutive aspects of the situation have been elsewhere considered.

The foregoing review of instances of governmental censorship in aid of religion shows that the King or State interfered in only some of them on behalf of the Established Church, and in most acted as if on behalf of all sects that were not unpopular. In this country state or national censorship in aid of one or all religions flagrantly violates both the first and the second clauses of the First Amendment. The late Justice Holmes would have so thought, for in speaking of Rosika Schwimmer he said: [38]

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think we should adhere to that principle with regard to admission into, as well as to life within this country.

Justice Brandeis concurred.

[37] Quoted from speech of W. Orr Chapman over K. S. L. Oct. 17, 1928. The same address, delivered on behalf of Al Smith, was in error in stating that the assembly passing the Maryland act of 1649 consisted of "a majority of Catholics." But Mr. Chapman deserves credit for quoting Jefferson's paragraph on the intended protection of the "infidel of every denomination."

[38] United States v. Schwimmer, 279 U. S. 644, 654 (1929).

CHAPTER VII

PRIVATE CENSORSHIP IN AID OF ORTHODOXY

AGED FREETHINKERS have been known to tell friends of instances where parents would punish children for having possession of "infidel" works and at the same time destroy the literature. Evidence of private censorships was seldom preserved. In a book by Collins and Watts, published in 1871, it is said that Anthony Collins (1676-1729), the English Deist, wrote, in addition to the works published in his lifetime, a great number of tracts and larger works which he intended should be published after his death. A collection of eight octavo volumes of manuscript containing attacks upon doctrinal Christianity, by which he intended his name to be transmitted to posterity, was arranged ready for publication as his posthumous work. The manuscript was bequeathed to Des Maizeaux, an author and editor who had edited the correspondence of Locke and Collins and some of the writings of Toland. Des Maizeaux was induced by the widow of Collins, who was in friendship with more than one clerical antagonist of her late husband, to relinquish possession of the manuscripts. For reasons which now seem obvious the books were never published, though the widow, like Des Maizeaux, must have known that Anthony Collins regarded them as the crowning efforts of his mind, and that they were superior to the books published in his lifetime, many of which are named in the biographical sketch of Collins in the *Encyclopedia Britannica* (11th ed.). Collins and Watts (later writers) state also that five volumes, at least, of Toland's works, meant for publication, were,

by his death irretrievably lost. The same fate befell some of the writings of Charles Blount.

The ancient and surviving *Index Prohibitorum* is made effective without governmental aid. Other censorships take the form of non-use, and frequent disparagement, of the works of reputable sociologists, psychologists, and historians.[1] Religionists are aided, also, by the fact that people are not inclined to read biography and history, and when they do they are furnished with books that omit, in some cases, material of an anti-religious nature. Biographies of Jefferson usually omit matter that would prove his Deism.

Religionists discouraged eulogy of deceased nonbelievers. In 1890 Senator J. C. S. Blackburn (1838-1918) of Kentucky spoke of his late colleague James B. Beck (1822-1890) in words which included these:

> He had been no sectarian in religion. He had held no creed; but he believed that the truest and most sublime of all faiths was that which taught men to use their best endeavors for aiding and elevating their fellow-men. . . . His had been the religion of humanity. . . . Let us rest in the belief that . . . his soul at last has found eternal rest . . . in the presence of God.

The "Christian Statesman" thereupon assailed Senator Blackburn, and after quoting the above "in the presence of God" sentence, declared: "But this is not the teaching of the Christian religion . . . our eternal destiny depends on our acceptance or rejection of this heavenly mediator." [1a]

Self-styled "Christian" statesmen have always been inclined to interpolate doctrinal matters in their private and official communications. Webster is being quoted and requoted, but Charles Sumner, a greater senator, is quietly ignored by propagandists. Religious censorship operated on him in two ways: (a) it made

[1] E.g. Prof. James H. Leuba's *God and Man;* Horace M. Kallen's *Why Religion;* Harry Elmer Barnes' *Twilight of Christianity;* Mencken's *Treatise on the Gods;* Frazer's *The Golden Bough;* also works of Prof. John W. Draper, W. E. H. Lecky. The Rationalist reader could compile his own, and a different, list.

[1a] Senator Beck died May 3, 1890. The Christian Statesman is quoted at length in *The Truth Seeker.*

it necessary for him to avoid disclosing his opinions to the public, and (b) to speak of his opinions only confidentially to friends. In 1833 Jonathan F. Stearns, a student at the Andover Theological Seminary, insisted that Mr. Sumner reveal to him what he thought of certain matters relating to religion, and in a reply, dated January 12, 1833, Sumner wrote: [1b]

> I attended Bishop Hopkins's lectures, and gave to them a severe attention. I remained and still remain unconvinced that Christ was divinely commissioned to preach a revelation to men, and that he was entrusted with the power of working miracles. . . . I do not think that I have a basis for faith to build upon. I am without religious feeling. . . .

The control of contents of school books was held by representatives of majorities. In 1904 Myers in his *Ancient History* says that Constantine "had been led to adopt this emblem (Labarum) through the appearance, as once he prayed to the sun-god, of a cross over the setting sun, *with the inscription* upon it, 'In this sign conquer.' " A one-time Professor of Ecclesiastical History in Andover Theological Seminary, like other scholars, explained that the foregoing story was invented by "Eusebius alone," while Lactantius and others spoke of a "dream." Prof. Murdock, the theologian, Gibbon, the historian, McCabe the Rationalist, all cite the further fact that Eusebius never mentioned the "vision of the cross" in his Ecclesiastical History. McCabe says that "Eusebius was a liar," but other historians are silent on that point. Anyway, religionists do put propaganda into text books, while objecting to the same practice on the part of "fellow travelers." They, the religionists, go further, and place religious instruction itself into text books, as illustrated by the old *New England Primer* which in bold type recited: In Adam's Fall We Sinned All. We still remember how works on Evolution, without religious interpolations, were objected to by religionists in Tennessee.[4]

[1b] Vol. 1, p. 117 of *Memoir and Letters of Charles Sumner*, by Edward L. Pierce, a trustee under the will of Charles Sumner.

[4] The unconstitutionality of anti-evolution laws was discussed by Blewett Lee in 11 *A. B. A. J.* 417 (July, 1925), where the full text of Jefferson's statute is printed.

No censorship is expected from a public library, yet the Carnegie Library at Springfield, Missouri, refused, in 1909, to accept *Key to Theosophy*, which had been offered by Prof. Fritz S. Darrow, then Professor of the Greek language at Drury College. Prof. Darrow's offer was of a book consistent with his opinions as a member of the "Universal Brotherhood and Theosophical Society," but was rejected because of objections coming from members of the Congregational Church, one of whom was reported to have said somewhere that Prof. Darrow "is an atheist and unfit to be an instructor in said Drury College." [5]

Libraries would not reject ponderous Ecclesiastical Histories. These did not come from "Infidels," but may have in some cases been given by the estate of a deceased minister. On the outside such books look safe. Mosheim's long and laborious work was accepted. But the contents, though meritorious, tend to disparage rather than to justify creed making, witch-hunting, and political religion. Dr. Mosheim was industrious and scholarly, and yet by some earlier and less honest writer he was induced to write as his own the following: [6]

> Many persons, as soon as they were baptized according to Christ's directions, and consecrated to God by prayer and the imposition of hands, were able forthwith to express their thoughts in foreign languages which they had never learned, . . . to call the dead to life, and to perform other deeds above the power of man.

Elsewhere there are passages showing cases where religious leaders practiced frauds for the sake of profit. The candid Dr. Mosheim tells what he knows and does not know of the alleged female pope.[7]

Prof. John William Draper's *History of the Conflict Between*

[5] Prof. Darrow recites some of the history in a petition quoted in Darrow v. Briggs, 169 S. W. 118 (1914); an editorial on the case, when first brought, appears in 37 *The Truth Seeker* 628 (Oct. 1, 1910).

[6] Sec. 9, Ch. IV Mosheim's *Ecc. Hist.* (Part I, p. 50 of Murdock's translation).

[7] Sec. 9, Ch. II, Book III, Part II. There is a list of ancient and later writers about the alleged papess Joanna in one 1909 issue of *The Truth Seeker*. There are now authorities that deny that such person existed.

Religion and Science was placed on the *Index* and for a time also excluded from some Protestant libraries. It mentions the Council of Nicaea, A. D. 325, summoned by Constantine to dispose of the contention of Arius that there was a time when the Son of God was not. Draper wrote:

> The will of the council was determined by a majority vote, and, to secure that, all manner of intrigues and impositions were resorted to; the influence of court females, bribery, and violence, were not spared . . . as a method of establishing a criterion of truth in religious matters, such councils were a total failure.

The works of Joseph McCabe are still unwelcome in many places. On Arius he wrote: [8]

> In 336 Constantine ordered the Bishop of Constantinople to admit Arius to communion, and the orthodox were so angered that they poisoned Arius.

What is accepted by libraries is Socrates Scholasticus' *Ecclesiastical History*, and in a translation of Book I, Ch. XXXVII, it is said that "Divine retribution overtook" Arius for "his daring criminalities," and the reader is then told of "the descent of the smaller intestines" and that "portions of his spleen and liver were brought off in the effusion of blood." The Christian author further says:

> The verity of the Nicene faith being thus miraculously confirmed by the testimony of God himself, the emperor adhered still more zealously to Christianity.

Religious censorship has been directed also against Edward Gibbon's *Decline and Fall of the Roman Empire*, for the reason, among others, that "he makes no attempt to examine the evidence of any particular miracle. . . ." [9] In other words, Gibbon is accused of omitting matter such as this: [10]

> When the Diocletian persecution began, the Prefect Lysias had Cosman and Damian arrested, and ordered them to recant. They remained constant

[8] McCabe, *The Evolution of Christian Doctrines*.
[9] 120 *Catholic World* 782.
[10] 4 *Catholic Encyclopedia*, 403.

under torture, in a miraculous manner suffered no injury from water, fire, air, nor on the cross, and were finally beheaded with the sword.

But the real, though secret, objection to Gibbon's history is that he points out that during the age of Christ, of his apostles, and of their first disciples, the Pagan and philosophic world never learned of the miracles occurring in their midst. One passage in Gibbon is:

> Under the reign of Tiberius, the whole earth, or at least a celebrated province of the Roman empire, was involved in a preternatural darkness of three hours. Even this miraculous event, which ought to have excited the wonder, curiosity, and the devotion of mankind, passed without notice in an age of science and history.

Prof. Draper writes that Constantine "ordered that whoever should find a book of that heretic (Arius), and not burn it, should be put to death." Socrates Scholasticus in his *Ecclesiastical History* goes into further detail, quoting the decree as follows: [11]

> If any treatise composed by Arius should be discovered, let it be consigned to the flames, in order that not only his depraved doctrine may be suppressed, but also that no memorial of him may be by any means left. This therefore I decree, that if any one shall be detected in concealing a book compiled by Arius, and shall not instantly bring it forward and burn it, the penalty for this offense shall be death; for immediately after conviction the criminal shall suffer capital punishment.

The name of Prof. Draper reminds that Dr. Andrew Dickson White also noticed religious censorship, for he wrote: [12]

> Nor has Protestantism the right to point with scorn to the Catholic *Index*, and to lay stress on the fact that nearly every really important book in the last three centuries has been forbidden by it, so long as young men in so many American Protestant universities and colleges are nursed with "ecclesiastical pap" rather than with real thought, and directed to the works of "solemnly constituted imposters," or to sundry "approved courses of reading," while they are studiously kept aloof from such leaders in modern thought as Darwin, Spencer, Huxley, Draper, and Lecky.

[11] *Eccl. Hist.* Book I, Ch. 9.

[12] White, *A History of the Warfare of Science with Theology in Christendom* (1899), vol.1, p. 169.

Continuation of religious expurgation seems circumstantially evidenced by the fact that many articles in the 14th edition of *Encyclopedia Britannica* omit matter contained under the corresponding titles in the 11th edition. The deleted words, phrases or passages are generally such as reveal frauds and cruelties of religionists in power. Thus Torquemada is less a fiend in the 14th edition than he was in the 11th. In the 11th edition we were told of the Massacre of St. Bartholomew, and that "it was impossible to restrain the Catholic populace." In the 14th edition the word "Catholic" is stricken out, which omission so broadens the meaning of "populace" as to make it include the 50,000 Protestants slain. In the 11th edition the article on "Eunuchs" speaks of the "moral shame of the papal choir." This is deleted in the 14th edition.[13]

Some probated wills contained provisions in aid of religious censorship. One in making a gift for a library directed the exclusion of "all skeptical trash." [14] Since the main beneficiary was a Presbyterian Church, the historic Racovian Cathechism of 1605 would, from the viewpoint of the donor, be "trash." As late as 1949 some religionists caused the banning, from the Philippine public schools, of a scholarly biography of Jose Rizal, *The Pride of the Malay Race*. The suppression of the book was opposed, however, by several groups, including The Philippine Federation of Christian Churches.

The propaganda that all anti-religious literature is "trash" has contributed much to non-publication of manuscripts and to neglect and destruction of those printed. Ethan Allen, hero of Ticonderoga, published *Reason the Only Oracle of Man*, which title reminds of Charles Blount's *Oracles of Reason*.[15] J. E. Henry, a historian, wrote:

> . . . long after the publication of Allen's book which had fallen into oblivion, even with its readers, that vile reprobate, Thomas Paine . . . filched from Ethan Allen the great body of his deistical and atheistical opinions, which from the time of Celsus, down to the age of Chubb, Tindal and

[13] Joseph McCabe, *The Lies and Fallacies of the Encyclopedia Britannica*.
[14] Crerar v. Williams, 145 Ill. 125, 34 N. E. 467 (1893).
[15] John Pell, *Ethan Allen*, p. 254.

> others, have been so often refuted by men of the utmost respectability of character.

The above is quoted as the verbal act of a religious author. Paine was a rebel of originality; his ideas were his own, and not "filched" from any one. But Allen's book did fall into "oblivion." In England other authors fared as Allen did, for the Rev. Adam Storey Farrar wrote: [16]

> English deists wrote and taught their creed in vain, were despised while living and consigned to oblivion when dead.

Religious censorship has operated upon religious teachers themselves. Those who refused to submit were made to suffer in one way or another. The Literary Digest reported that "Dr. Horace Calvin Day, biology instructor at Howard College, a Baptist institution . . . is unable to swallow either story whole" (referring to the "whale" and the "ark" stories). "After Dr. Day's lecture he was requested to resign . . ." the Digest continues.[17] Prof. Lucius Hopkins Miller when holding the chair of biblical instruction at Princeton University must have offended some by modernistic teaching for a Protestant Church Assembly at Stony Brook, Long Island, in 1914, sought to have him removed from his position.[18] Economic censorship may be at times involved. When Prof. Scott Nearing wrote to the evangelist Sunday: ". . . it is Dives who has made your campaign financially possible," dismissal from the University of Pennsylvania soon followed.[18a]

In January, 1913, Prof. Willard C. Fisher was dismissed from Wesleyan University of Middletown, Conn., apparently because he had remarked, in an address before a club in Hartford, that he believed in "having an uproarious good time on Sunday." He had served as teacher for 20 years, and was holding the chair of economics and social science.[19] His dismissal was criticized by

[16] Farrar, *A Critical History of Freethought*, 164.
[17] *Lit. Dig.*, Jan. 4, 1930, p. 22.
[18] 41 *The Truth Seeker* 580 (Sept. 12, 1914).
[18a] 42 *The Truth Seeker* 408 (June 26, 1915).
[19] 40 *The Truth Seeker* 216 (Apr. 5, 1913); *id.* 340 (May 31, 1913).

the faculty of Cornell University. He survived the banishment, for *Who's Who in America* (1924-1925) reports him as "prof. economics, New York U., since 1916."

The Rev. Dr. Charles A. Briggs was suspended in 1893 from the Presbyterian ministry for some heresy that did not offend Union Theological Seminary, which retained him as professor. The Rev. Leon Milton Birkhead did not wait to be expelled, but while still in good standing left a Methodist Church and became minister of a Unitarian Church. Because of incessant propaganda against non-religious persons, the latter were coerced into silence. Whatever the reason therefor, the fact is that former U. S. Senator Charles S. Thomas revealed his Secularism fully only after his death by the publication of *Morituri Te Salutamus*. The statesman Charles Sumner left a letter revealing nonbelief in the divinity of Christ. Daniel Henry Chamberlain, former governor of South Carolina, left at his death (1907) a paper showing his rejection of the ideas of the Fundamentalists. Long time United States Senator Shelby M. Cullom in a book published in 1912 admitted nonbelief in a future state.[19a] James Madison remained silent enough, concerning his own theology or lack thereof, as to evidence what in his time was opprobriously called "infidelity." So it was, in the nineteenth century, that it was safe and profitable for politicians and others to profess devotion to "Christianity" and belief in Original Sin, Hell, and Redemption, but it was both unpopular and unsafe for minorities to reply. The Unitarians themselves, though gaining in numbers, were practically silent.

There have been times when outdoor Freethought lectures in some cities were known to be delivered, and then it was that occasionally an editorial would appear in some religious paper assailing the speaker and implying that he was using certain provocative methods. There was no proof that the critic had ever heard his victim. After a number of such editorials appeared, and as if influenced by their inflammatory nature, mobs assaulted the speaker, and sometimes he was arrested, as if an offender. The

[19a] Shelby M. Cullom, *Fifty Years of Public Service*, quoted in 40 *The Truth Seeker* 56 (Jan. 25, 1913).

American Bar Association's Committee on the Bill of Rights filed a brief in the *Hague* case (307 U. S. 678, 679) pointing out that to prevent abridgment of the right of free speech "it is essential not to yield to threats of disorder." That plain truth was not recognized in the instances where Trinitarian religion received the supposed aid of mobsters. One of the assaulted persons had said nothing; he was suspected only of being, like Mark Twain, a subscriber to The Truth Seeker.

A curious form of censorship or aid was once attempted by George William Childs by his order that the Philadelphia *Public Ledger* make no mention of Col. Ingersoll's presence or lecture in Philadelphia.[19b]

In the pre-modernist days around the middle of the nineteenth century unbelievers were ridiculed for their denial of the truth of the Biblical "whale" story and for their use of the same story as illustrative of the preposterousness of scriptural tales. Finally the "Higher Critics" came to their rescue, and some one wrote:

> Critic, spare that whale!
> Touch not a single fin!
> In youth it sheltered me
> From apathy and sin.

Religious censorship was so effective at one time that potential unbelievers never learned of the existence of Rationalist literature.

Another narrative which "Infidels" refused to believe was one where Joshua commanded the sun to "stand still" (Joshua 10:12). The Rev. David M. Nelson in his famous book, *Cause and Cure of Infidelity*, furnished lay Christians with the following verbal weapon to use on the "Infidel":

> Ask him what he thinks, when the Chinese history speaks of Yao, their King, declaring that in his reign the sun stood so long above the horizon that it was feared the world would have been set on fire; and fixes the reign of Yao at a given date, which corresponds with the age of Joshua, the son of Nun.

[19b] 21 *The Truth Seeker* 88 (Feb. 10, 1894).

It was very considerate of Rev. Nelson to recommend answering the "infidel" with argumentative words, but that was not the system generally prevailing. In the first place potential "infidels" were kept from discovering their own literature, and secondly, everything possible was done to prevent the writing of Rationalist books, and to destroy those already written. Much of this was done by governmental aid, as in official burning of books, prosecutions for sale of heretical works, and invalidation of wills and trusts intended to preserve old and create new Rationalist literature. Our own Supreme Court, as if knowing something of state aid to religious censorship, once appropriately observed that Madison "demonstrated that religion was not within the cognizance of civil government." [20] Thinking more of religious oppressions than of censorship, Justice Murphy said: [21]

> From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs.

The Justice himself unwittingly forged another weapon, that is, a failure to include the word "non-religious" before the word "beliefs."

Students of religion, and people generally, do not have the time, nor could they be persuaded, to read tedious or other histories of those theological hypotheses that became parts of creeds that yet survive, and so it is conventional to accept assumptions on the authority of those claiming to be informed. Neglected also are the histories of Ebionitism, Gnosticism, and many other doctrines adopted by thoughtful leaders of sects afterwards suppressed. Some professional theologians have read much, and apparently remained orthodox. As to "orthodox . . . teachers" Justice Jackson remarked ". . . even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt." [22]

Certain theologians, like confidence men, secretly laughed at

[20] Reynolds v. U. S., 98 U. S. 145, 163 (1878).
[21] Prince v. Massachusetts, 321 U. S. 158, 175.
[22] Jackson, J., in United States v. Ballard, 322 U. S. 78, 95 (1944).

the Bible. The man who almost became Archbishop of Canterbury, Dr. Thomas Burnett (1635-1715), wrote *Archaeologicia Philosophica*, a book wherein appeared a humorous dialogue between Eve and the serpent. It reminded that Moses took no notice of the serpent's gift of speech. It expressed wonderment that only the serpent was thus favored, the other beasts of Paradise being dumb. In 1720 Burnett's executor obtained an injunction restraining other persons from printing and publishing a translation, the original being in Latin, so that the common people could not read it. The Lord Chancellor granted the relief on the ground that since the work contained "reflections on religion" a translation in English ought not to be permitted to reach the masses.[23] Dr. Burnett may have tried to liberalize his fellow clergymen, but some of them accused him of being "a dangerous character." [24]

Critical historical reading produced the "Higher Critics" and made of Joseph McCabe an atheistic Rationalist. Modernism might have arisen earlier if the testimonies of Arius, Celsus, Hierocles, Porphyry, the emperor Julian, and others had not been suppressed. Tracing the evolution of enforced creeds weakens Trinitarian faith, which is one reason for the prevailing silence of experts, and ignorance of laymen, on doctrinal contests prior to, at, and after various mediaeval councils.

What is called "religious instruction" in connection with elementary schools is Trinitarian instruction, as the Trinitarian sponsors ought to admit. Special significance is given to Easter, Good Friday, and Christmas, and to the doctrines particularly recognized on those days. Propagandists claim to desire "religious instruction" in the public schools only to teach "the Christian way of life," [25] but their intent involves support of specific doctrines which are not accepted either by all sects or all persons.

[23] Burnett v. Chetwood, 2 Merivale 441; 35 Reprint 1008.

[24] See title Burnett, Thomas, in *Enc. Brit.* Also vol. VII, *Dictionary of National Biography* (Macmillan & Co., 1886) under title Thomas Burnett. The book is referred to, and quoted in part, in Collins and Watts, *Biographies of Ancient and Modern Celebrated Freethinkers* (Boston, 1871), and in Rev. Farrar's *A Critical History of Freethought.*

[25] Vol. 94 *Cong. Record*, part 10, App. p. 1670.

Doctrinal instruction in the name of the State tends to create bitterness. Thus it was that when a Unitarian, instead of a Trinitarian, was elected chaplain to the House of Representatives, the event "occasioned much surprise," [26] and the Rev. William Hawley "preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors. . . ."

The foregoing is part of the basis for concluding that when a school board permits "released time" religious instruction it is, in effect, taking sides in a doctrinal controversy, for the teaching gives opportunity to impute falsehood to, and discriminate against, the faith and opinions of Jews, Unitarians, Rationalists, and still others. The ignored or disparaged opinions, too, deserve respect and respectability, for they are held not only by the "village atheist" but are also the views of many of the greatest thinkers, which reminds that the late Chief Justice and one time President of the United States, William Howard Taft, spoke for himself when he said: [27]

> . . . they deny that they lose the essence of Christianity when they give up miracles, the Virgin birth, and the deity of Jesus.

That indicates that the Unitarians believe much as did the Ebionites who lived within the first century after the death of Christ and ought to have known the truth. Of them, Mosheim says: "For though they supposed Christ to be an ambassador of God and endowed with divine power, yet they conceived him to be a man, born in the ordinary course of nature, the son of Joseph and Mary." In the sixteenth century the Socinians, with leaders of great learning and talents, thought practically the same. For like opinions Michael Servetus was burned in Geneva in 1553. In America he would have been put to death in a different manner, under the Maryland "Toleration" Act of 1649.

If under the Champaign "released time" program the Jews could instruct their own children, separately, they would still be compelled to realize that Trinitarian instruction on a larger scale

[26] John Adams, *Diary* for Dec. 23, 1821.

[27] Taft, *The Religious Convictions of an American Citizen* (Published by Am. Unitarian Assn., Boston).

was being carried on in the name of a governmental agency. Mrs. McCollum knew that her opinions, being also the views of inarticulate millions throughout the world, were being disparaged in the same manner, arousing the same prejudices as do Fundamentalist radio sermons, and encouraging a continuation of the old censorship of Rationalist works and Unitarian publications.

CHAPTER VIII

"DEBASING TYRANNY OVER THE MINDS . . . OF MEN"

THE words in the heading of this chapter are borrowed from the following sentence in the August, 1948, *American Bar Association Journal:*

> With the mounting evidence from many lands before us, can it be said that the world has ever seen worse and more debasing tyranny over the minds and souls of men than Soviet-Communism inflicts wherever it holds sway?

History speaks for itself. It convinced Thomas Jefferson in a way whereby he would answer the Journal's question in the affirmative. He wrote that "the effect of coercion" (and he was speaking of such religious coercion as caused the burning, torture, and imprisonment of heretics and nonbelievers) was "to make one half of the world fools, and the other half hypocrites; to support roguery and error all over the earth." In his own time preachers whipped up such public opinion that persons not convinced of the verity of original and imputed sin and the need of a Savior dared not admit their nonbelief. The highest court of Connecticut during Jefferson's lifetime declared that for one to be reputed as an "Infidel" "can scarcely fail to deprive him of the esteem of mankind, exclude him from intercourse with men of piety and virtue, and render him odious and detestable." [1] President Monroe would never write on a religious subject. Was he, too, coerced into silence? Possibly, for the historian J. M. Robertson believes,

[1] Stow v. Converse, 3 Conn. 325, 342 (1820).

from testimonies quoted by Robert Dale Owen, that both Madison and Monroe "seem to have been of his [George Houston's] way of thinking." [2] Houston had in 1813 been sentenced to two years' imprisonment for blasphemy, having published d'Holbach's *Ecce Homo,* and thereafter came to America and published a freethought journal.

Was the eminent Charles Sumner coerced into silence? In the preceding chapter is a quotation from Sumner's letter of 1833 which indicates the reason for reticence on religious subjects thereafter. Public opinion was inflamed against the "Infidel."

Long after Jefferson's time, and even now in some states, a citizen dares not admit that he is free from fear of hell if he wishes to retain the right to testify as a witness. Of a person disqualified as a witness because of nonbelief in a future state of punishments, the General Court of Virginia once said: [2a]

> The proscribed man may suffer in his property, or in the persons of the members of his family. His goods may be stolen, his dwelling broken into by the midnight robber, or burned by the incendiary; his child may be beaten, or his wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him. This very incapacity may have caused the calamity.

The late Charles S. Thomas, one time United States senator from Colorado, would not publicly reveal his opinions in matters of religion while he lived, but shortly before his death he told an interviewer that the persecutions and sorrows which spring from organized religion made him skeptical of the advantages of belonging to this or that church. He prepared a statement to be read after his death. It was published in the *Denver Post* of June 25, 1934, and contained this atheistic sentence:

> "I have a conscience and a keen one; but it never bothered itself with the fictions of original sin, the fall of man, salvation by faith or at all."

A rival newspaper thereupon assailed his memory, and it was implied that he ought to have been as silent at and after death,

[2] 1 Robertson, *A History of Freethought,* 57 (1929).
[2a] Perry's Case, 3 Grattan (Va.) 632, 644 (1846).

concerning his opinions, as he had been during his life time. Possibly there is yet surviving the unwritten law created by Fundamentalist majorities in the past. It was that a Rationalist must keep his knowledge and opinions secret. The Connecticut court, quoted herein, said enough to show how that law would be enforced against an obscure citizen. The influential "Infidel" would have been advised to remain silent for the sake of saving the faith of the faithful and their hope of ultimate reunion with deceased relatives. It was never admitted that people who did shed Fundamentalism actually felt better. Thomas Jefferson encouraged, not merely progressiveness but even Atheism, for he wrote to his nephew Peter Carr that if he found "no God" he would "find incitements to virtue in the comfort and pleasantness" that would be realized "in its exercise."

If it was not Christian "tyranny over the minds of men," it was something near that kind of coercion that prevented Madison, Monroe, Sumner, and Thomas from revealing, while living, their private opinions on the prevailing theological doctrines. Former governor Daniel Henry Chamberlain, of South Carolina, dying in 1907, left a paper wherein he excluded "the idea of a presiding or controlling Deity who continually watches over the universe," and he also rejected "such ideas as sin, redemption, conversion, salvation, atonement, . . . the Trinity, . . ." Coercion of some kind compelled professors in theological seminaries and other institutions to conceal incipient heresies. Some could not restrain themselves. In 1922 Dr. A. Wakefield Slaten, head of the Department of Biblical Literature, at William Jewell College, admitted enough to cause his dismissal.

It was in spite of, not because of, Fundamentalist coercion that there were belated "Developments in Religion" to the extent explained by Dr. Davis in the Aug.-Sept., 1948, issue of the *American Bar Association Journal*. Of course Dr. Davis did not shock the "simple religious folk" as Senator Thomas is said to have done, for he used such ponderous phrases as this: "The most significant single movement in religion in the past fifty years has been the emergence of the idea of development and growth. . . ." The "debasing tyranny over the minds of men" exercised by reli-

gionists in or with power is relaxed to the extent that some "development" is permitted by some denominations other than the ones regarded as "Fundamentalist."

It is to the glory of Justices Black, Frankfurter, and Rutledge that their opinions in the *McCollum* and *Everson* cases, so long as they remain authoritative, will, as a *Magna Carta* of Freedom from Religion, do much to minimize such forms of "debasing tyranny" as have been practiced by political religionists in the past. Because of the efforts that are being, and will be, made to evade the two decisions above named, and to have them modified, if not overruled, the Rationalist lawyer is disposed to recall, with feeling, these words of Jefferson which the *American Bar Association Journal* itself emphasizes: [2b]

> "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man."

His own writings suffered from tyrannically inclined preachers. Speaking of Jefferson's *Memoir* one of them said: [2c]

> I do not recommend the purchase of it to any man, for it is one of the most wicked and dangerous books extant.

The opinions in the *McCollum* and *Everson* cases could be so applied as to greatly limit the number and kinds of situations where government and religion "may work together," and that is the chief cause of complaint on the part, not of the rank and file of church members, but of their leaders, self-appointed or otherwise. Lessons of history demonstrate that there should be gratitude, not complaint, for it is because public officers and preachers did "work together" that they left behind a record which reveals religious "man's inhumanity to man." In previous chapters court records are invoked in support of the foregoing thesis, because the recital of facts in such records is reliable and the reports are permanent and accessible to persons interested. Neither this writer nor others can readily, if at all, find unreported cases, but they do exist. Mr. John G. Palmer of Greencastle, Pennsylvania, pri-

[2b] 34 A. B. A. J. 698 (Aug., 1948).
[2c] Rev. Dr. Wilson, sermon on *The Religion of the Presidents.*

vately recorded and published what happened in the matter of a claim against the estate of W. H. Palmer on Dec. 21, 1923. A lawyer solemnly arose, and still more solemnly objected to the auditor's permitting John G. Palmer to be a witness for the claimant, and the objection was on three pretended grounds: (1) that the witness did not believe in a Supreme Being; (2) that he did not believe in a future state of rewards and punishments; and (3) that he did not believe in an omniscient God who would punish him for swearing falsely. The auditor, as trier of fact, seemed impressed. Mr. Palmer refused to answer any questions touching his theological qualifications to be a witness. And why should he? The year was 1923, and the statutes already contained the Act of April 23, 1909, which removed the disability of non-religious persons and further provided that "no witness shall be questioned in any judicial proceeding concerning his religious belief." [3] The attempt to stigmatize Mr. Palmer failed, but only because of a then recent statute. Why recent? Such a law ought to have been in effect even in the time of William Penn, but such "debasing tyranny over the minds of men" prevailed that the reform was delayed to the year 1909.

It was in Pennsylvania, too, that judges responded to the wishes of religious censors, or acted accordantly, when they developed decisional law in such a way as to destroy wills and trusts intended to bring Rationalist books to public libraries,[4] or for "building a hall for the free discussion of religion." [5] Such "debasing tyranny" came over from England. Judge Eugene O'Dunne of Baltimore, in 1932, noticed: [6]

> There was a trust left by a Jew to a Jewish institution, Yeshiva or something like that, for the reading at this meeting house—of the Jewish law, and for the extension of the Jewish religion. . . . The validity of the trust came up before the highest court in England. . . . The solemn court of England declared, that they couldn't sustain the trust, because it was contrary to the Christian religion, "which was part of the common law of

[3] 51 *The Truth Seeker* 60 (Jan. 26, 1924). Statute is quoted in Section 1828, p. 885, of III Wigmore on Evidence (2d ed.).

[4] Manners v. Library Company, 93 Pa. St. 165 (1880).

[5] Zeisweiss v. James, 63 Pa. St. 465 (1870).

[6] Opinion in Levering v. Ennis et al, Superior Court, March 12, 1932.

England." . . . and they took the money away from the Jewish corporation and handed it to a Protestant minister to preach in perpetuity and extend the Christian religion, and thereby perhaps convert the Jews.

Majorities and militant minorities could have boasted of their power over practical politicians in obtaining aid for Fundamentalist doctrines. Men in public life who resisted clerical pressure deserve credit, and memorial mention of some of them is made in Chapter X on Respecters of Constitutional Separationism.

Legislative surrender to religionists seemed involved in the passage of the Tennessee anti-evolution statute. Fundamentalists sought a like law in Kentucky in 1922, and had a bill in the Texas House in 1923. In Florida and in Mississippi the same movement was strong. In Arkansas the Fundamentalists invoked the Initiative and Referendum, and on October 6, 1928, secured the adoption of their bill by a popular vote of 108,991 as against 63,406. That law is still on the Arkansas statute books, and provides "that it shall be unlawful for any teacher . . . to teach the theory or Doctrine that mankind ascended or descended from a lower order of animals." (Ark. Statutes, 80-1627.) The law was meant to be a crutch for the Adam and rib story. Charles Smith spent five weeks, about half of the time in jail at Little Rock, trying to defeat the measure. Arkansas is his native state. The blasphemy charge against him was dismissed five years later.

It is a serious situation when a Fundamentalist majority by the Initiative and Referendum establishes Fundamentalism as the law of the State, and thus compels the educated to conceal their knowledge and opinion. Under such a power the Athanasian Creed could be forced into public schools.

While the anti-evolution mania was manifest, some members of Congress placed into an appropriation bill a provision that would deny compensation to any "director of intermediate instruction, or supervising principal who permits the teaching of partisan politics, *disrespect of the Holy Bible,* or that ours is an inferior form of government." [6a] At that time, June 7, 1924, "disrespect" could have meant teaching of evolution or geology. As to the consequences of suddenly depriving a teacher of his salary for

[6a] 43 Stat. 553.

past services, it may have been thought by the sponsoring Congressman that sufferings by others is just an insignificant by-product of a campaign to force "respect" for the Bible.

In Ohio three governors vetoed measures that would accept from John Bryan's estate $50,000 worth of land for a Natural History Preserve. The gift had been made on condition that no public religious services should ever be held on it. One governor of the three was mentioned, in this connection, in the American Mercury.[7] "The last of the vetoing governors . . . argued that the state was a 'community temple' that would be desecrated by a spot where God could not be worshiped publicly. 'Let us see' he exhorted, 'that it reaches our children unprofaned.' " [8] On May 2, 1923, the legislature repassed the bill over the veto of Governor Donahey.[9]

The practice of Congress of appropriating funds for its chaplains is one of the "well-recognized and long established" practices which are cited in opposition to the *McCollum* decision. In 1927 a citizen sought to prevent payment of public monies to such chaplains,[10] as if relying on the First Amendment. The suit was dismissed on the ground that the plaintiff did not, as a taxpayer, have a sufficient interest to maintain the action. The system of tax-supported chaplains in penal institutions has been challenged without the aid of our new case law, not then yet developed. The effort failed, the court invoking the theory that religion is a factor of "rehabilitation," [11] without mention of its failure to prevent recidivism.

On January 25, 1894, Representative Morse of Massachusetts introduced in the House, and afterwards supported, a resolution proposing that the Preamble of the Constitution be so amended that it would begin as follows:

> We, the people of the United States, devoutly acknowledging the supreme authority and just government of Almighty God in all the affairs

[7] 15 *Am. Mer.* 361 (1928).
[8] 2 Macdonald, *Fifty Years of Freethought*, 617.
[9] *Laws of Ohio* 1923, p. 132 (H. B. 215).
[10] Elliott v. White, 23 Fed. 2d 997 (1928).
[11] Peo. ex rel N. Y. League for Separation of Church and State v. Lyons, 21 N. Y. S. 2d 250, 173 Misc. 821 (1940).

> of men and nations, grateful to him for our civil and religious liberty and encouraged by the assurances of his Word to invoke his guidance, as a Christian nation, according to his appointed way through Jesus Christ, in order to form a more perfect union, . . .

The sponsors of that resolution knew that members of state legislatures were not so numerous but that they could be reasoned with by men desiring to keep government and religion separate, and would in apt time learn the vice of the proposed amendment. Therefore the resolution designated the *convention* mode of ratification. The motive could have been to get the benefit, in a campaign for ratification, of the mob psychology that has been operative in old-fashioned revivals. At one time a popular vote might have ratified the witchcraft hangings in Massachusetts, especially since trusted leaders and Biblical experts had formulated and enacted the witchcraft statutes. In Champaign, Illinois, a popular vote in the *McCollum* case would have been adverse to the plaintiff. Religious psychology has produced strange results.

Somewhere in several books and articles written in opposition to the *McCollum* decision there is incorporated an argument to the effect that it interfered with the "democratic process" and that the people of a state ought to be permitted to have such laws as they desire, and to "exercise" religion through public officials as well as privately. Catholics themselves now join Protestant fundamentalists in the use of the "democratic" argument, and yet they once objected to being victimized by the same formula in several cases where "the people" of a school district insisted on having a Protestant version of the Bible read in public schools. Both Madison and Jefferson sought to deprive "the people" of the power to harass or oppress minorities by electing a "magistrate" or giving him authority to pretend to judge what is "religious truth." The people do not desire such power. It is being sought, in their name, only by self-appointed leaders and spokesmen, some of whom have invaded the law magazines for that purpose.

If Rationalism could be popularized by another Ingersoll, or even if religious Modernism could reach the masses by another, but articulate, Taft or Channing, the professional Fundamentalist religionists would cease to seek or use leadership in clamors for

governmental recognition of doctrines that are sacred to some but chiefly revenue-producing to them. It was a thoughtful and deliberative *Congress*, not a set of packed conventions, that defeated the Morse resolution in 1894. And it was a calm Madison, not an excited Jonathan Edwards, who formulated the First Amendment or at least approved its final form, and his intent, in the light of all he had previously and thereafter written, was to reduce or prevent "tyranny" of all kinds. This is indicated, also, by Madison's proposal that the Amendment contain the words: "The civil rights of none shall be abridged on account of religious belief." He knew, as did later the General Court of Virginia, what the consequences of abridgment would be to the man discriminated against.

If the First Amendment is ambiguous, as seems indicated by current disputes about its meaning, the ambiguity may have been intentional, for Madison knew the prevailing hostility toward non-religious persons, and wished to give them constitutional protection. His "civil rights" proposal was perfectly accordant with the language of the Virginia statute.

Just as famous actresses have lent their names in aid of particular brands of cigarettes, so well known men have allowed the use of their respective names in religious movements. In 1871 Justice William Strong consented to be honorary president of the National Reform Association which was then sponsoring "God-in-the-Constitution" resolutions in Congress. John Quincy Adams was a defender of The Right to Petition, which explains why he, a Unitarian, introduced the "Christian" petition in Congress in 1844. In the 80th Congress, Senator Capper not only introduced S. J. Res. 150 proposing a "Jesus Christ" amendment to the federal constitution but also authorized sponsors to quote him as saying: "I am strong for your Christian Amendment Resolution."

On July 10, 1947, Senator Kilgore placed in the Congressional Record a sermon by Dr. Peter Marshall, and so both names are linked, not in the cause of religion as such, but in support of the following statement in the sermon: [12]

[12] *Cong. Rec.*, App. The record for Feb. 7, 1949 contains a sermon by Dr. Elson, also sectarian.

". . . all pious vague affirmations about God as the Supreme Being are *vain* unless supreme honor is specifically given to Jesus Christ."

The use of religious proclamations is well known. On Sept. 8, 1914, President Wilson issued a proclamation for a day of prayer for peace. The document is non-sectarian in that it does not comply with Dr. Marshall's demand of the mention of Jesus Christ. A needless official proclamation came from the Governor of Nebraska in 1914, appointing March 29, 1914, as "Go-To-Church Day." [13] In the preceding year the Governor of Arizona designated Sunday, Feb. 21, 1915, as "Everybody-go-to-Church Sunday."

To prevent utterance of language conflicting with the pretended assumptions of presumably authoritative theologians, judges would even validate abduction of a person suspected of having an intent so to speak—before he could begin. Charles Bradlaugh was arrested on March 3, 1861, after saying only: "Friends, I am about to address you on the Bible." Lord Chief Justice Erle held that no damages could be recovered for the arrest, declaring:

> . . . there are certain opinions, striking at the very root of public and private morality, the dissemination of which is more injurious than almost any act that can be committed.

Such formula could have been applied to expressed Unitarian opinions, because the "morality" was thought to depend on fear of hell and belief in other Trinitarian doctrines. Mr. Eaton's denial of the divinity and miracles of Christ was deemed, denounced, and punished as a "foul" [14] crime.

Stephen Girard wanted to protect the youth of Girard College from religious tyranny over their minds. Daniel Webster, on behalf of selfish litigants, almost persuaded the courts to invalidate the educational gift because the will barred preachers from the premises. Webster claimed, probably rightly, that the will was "derogatory to the Christian religion, tending to weaken men's

[13] 41 *The Truth Seeker* 229 (Apr. 11, 1914).

[14] Eaton's Case, 31 Howell's *State Trials*, 927. See also Swancara, "Fundamentalism and the Law," LXV *United States Law Review*, 593 (1931).

respect for it and their conviction of its importance." [15] The use of the word "importance" was apt, for success in business or in politics could not be achieved without at least a silent acquiescence in widespread religious practices. As late as 1885 Foster North was suspended from the University of Illinois for refusal to attend chapel.[16]

When Government and Religion worked together, or where rulers and officials used power in aid of particular doctrines, the result was to coerce the masses into believing or pretending to believe the doctrines favored. The practice of official recognition of doctrines still survives, in statutes and proclamations. In fourteen states there may be found, also, some form of a blasphemy statute, which threatens fine and imprisonment for any unbeliever who refuses to remain silent. Massachusetts is one such state, and there in 1928 a warrant was issued for the arrest of Prof. Horace M. Kallen, scholar and educator, for having said: [17]

> If Sacco and Vanzetti were anarchists, so also were Socrates and Jesus Christ.

An editorial in the *Catholic World* later said:

> For the life of me I cannot see anything ridiculous or tyrannical in that statute, unless we are to admit that ours is not a Christian civilization.

"Tyranny" is something recognizable only by the victims. Modernists and Unitarians would recognize it if proceeded against them, though the prosecutors might not. Under the Massachusetts statute the crime called blasphemy is committed by "denying . . . His . . . final judging of the world, . . ." [18] That clause appeared

[15] Vidal v. Girard's Exrs., 2 Howard (U. S.) 127 (1844). Webster's Christian speech is found in 7 *Works of Daniel Webster*, 176, and the most inflammatory parts are quoted in favor of Bible reading in the schools in Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334. Note the calmer observations of Hines, J.

[16] 42 *The Truth Seeker* 17 (Jan. 9, 1915).

[17] Swancara, Blasphemy in Massachusetts, 57 *The Truth Seeker* 143 (May, 1930). The case was referred to in the press on and after Aug. 27, 1928. The warrant was issued but not served.

[18] Sec. 36, Ch. 272, G. L. 1921.

also in the Act of 1782 when the Westminster Confession was the prevailing creed, and it contained this dogma: [19]

> The souls of the wicked are cast into hell, where they remain in torments and utter darkness, reserved to the judgment of the great day.

To deny "hell," therefore, is to be a criminal in Massachusetts. "Civilization" of a secular kind may not approve such law, but judges are still able to follow, arbitrarily, the reactionary Lord Finlay who held: [20]

> It can never be the duty of a Court of Law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is.

The foregoing judicial Mediaevalism was conformed to, impliedly, by the Supreme Court of Maine in 1921, for it upheld a conviction under the blasphemy statute of that state. The accused had ridiculed some of the doctrines which Unitarians and Modernists reject in silence. He pleased his hearers, in his own hall, and no breach of the peace was threatened. The court's Fundamentalist opinion was written by a judge then listed in *Who's Who* as a Unitarian. The opinion cited the fact, as if it were material, that President Harding added to his constitutional oath the words "So help me God." [21]

There is a temptation at this point to repeat the phraseology of Jefferson's statute, but since that is already familiar it is still appropriate to quote from the Rev. Philip Furneaux (1726-1783) as follows: [22]

> For if the magistrate be possessed of a power to restrain and punish any principles relating to religion, because of their tendency, and he be the judge of that tendency; as he must be, if he be vested with authority to

[19] Williston Walker, *History of the Congregational Church in the United States* (1907), p. 216; Cotton Mather, *Ratio Disciplinae.*

[20] Minority opinion in Bowman v. Secular Society, Ltd., Ann. Cas. 1917D 761, 768 (1917).

[21] State v. Mockus, 113 Atl. 39.

[22] Schroeder, *Constitutional Free Speech*, 105; See 20 *Dict. of Nat. Biog.*, p. 331.

punish on that account; religious liberty is entirely at an end; or, which is the same thing, is under the control, and at the mercy of the magistrate, according as he shall think the tenets in question affect the foundation of moral obligation, or are favorable or unfavorable to religion and morality.

The public officials who have in the past used their authority to compel pretense of believing certain theological dogmas, or to exercise censorship, or to give governmental recognition to particular doctrines, were probably affiliated with churches having static creeds. At any rate, it never occurred to them to think of the origins of the doctrines they were promoting. Jefferson and Madison probably would have concurred in the following passage from the writings of the Rev. Furneaux:

Let us, then, look into ecclesiastical history, and see what the councils, synods, convocations, and other general, national, or provincial assemblies of the clergy, have, for the most part, been, from the first famous and revered Council of Nice, down to the last session of our own convocation in England. When I reflect on the policy and artifice used in the management of such assemblies; on their obsequiousness to the caprices of princes, and ministers of state, or of potent ecclesiastics, and even of some of their own ambitious and turbulent members; on their prejudices and passions, their private and party views, their scandalous animosities and contentions; on the small majorities by which questions of importance, intended to bind not only the men of that age but their posterity, have been determined: on the respectable characters which have often appeared in the minor number: and above all, on their self-contradictions, and their mutual censures and anathemas; I say, when I consider these things, I own, they somewhat *abate my reverence* for the determinations of such bodies.

John Milton (1608-1674) in his *Areopagitica* (1644) argued for the freedom implied in his words: ". . . Give me the liberty to know, to utter, and to argue freely according to conscience, above all (other) liberties. . . ."

Some of the oppressors who exercised "debasing tyranny over the minds of men" were themselves victims of such tyranny. Lord Hale was but acting consistently with "religious instruction" given him by others when he, as judge, made the following declaration:

That there are such creatures as witches, I make no doubt at all; for first the Scriptures have affirmed so much.

Accordingly he was willing to, and did, commit judicial murder of Rose Cullender and Amy Duny in 1662. At least until recently, law students in America were encouraged to read Blackstone, and in his *Commentaries* they would find this:

> To deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, . . .

Hale's opinion, or rather the doctrine involved, prevailed in the colonies, particularly in Massachusetts, for section 94 of the laws adopted in 1641, entitled *Body of Liberties*, provided that if "any man or woman be a witch, that is, hath or consulteth with a familiar spirit, they shall be put to death."

Government and Trinitarian religion worked together, in religious terrorism and tyranny over minds, in the adoption of the Maryland Toleration Act of 1649, for they prescribed death for any one who "shall deny our Savior Jesus Christ to be the Son of God, or shall deny the Holy Trinity, . . ." [23] The clause last quoted, or one identical in form, was also placed in the Maryland statute of 1723, which was judicially quoted as late as 1908 as still being a part of the statutory law in effect in the District of Columbia.[24]

The English Blasphemy Act of 1698 (9 Wm. III, c. 32) provided only for imprisonment, and then only for a second offense. Until the Relief Act of 1813 (53 Geo. III, c. 160) Unitarians were subject to the penalties of the old Blasphemy Act because it applied to persons who "deny any one of the persons in the Holy Trinity to be God." Jews were excepted from the Blasphemy Act because of its provision that it should apply only to "persons having been educated in, or at any time having made any profession of, the Christian religion." So the only way in which the established church and the government were "protected" from Jewish influence was by judicial nullification of legacies and trusts for the promotion of the Jewish religion, and by a statute "to oblige Jews to maintain and provide for their Protestant children."

[23] Scharf, History, etc.: 39 *Yale Law Journal* 659 (1930).

[24] Dist. of Columbia v. Robinson, 30 App. Cas. (D. C.) 283, 12 Ann. Cas. 1094.

These practices ended by adoption of the Jewish Relief Act of 1846 (9 Vict. c. 59) which validated Jewish trusts and repealed the act referring to "their Protestant children."

The history of the Act of 1698 is given in Stephen's *History of the Criminal Law*, and it is there stated that the Bill was amended by the House of Lords in such a way as to apply to Jews. The Commons would not concur, intending, apparently, to protect the Jews who by wealth and international connections had become persons of consideration and importance in the kingdom. The clause using the words "persons having been educated in . . ." protects Atheists as well as Jews, but Atheists, if any existed around that year, would have been prosecuted under judge-made law, which had originated long prior to the statute.

The judge-made blasphemy law was such that not only was a deist punished for a prior statement, but also punished, as for contempt of court, for arguing, in his defense, that he had made a reasonable statement. Thus a defendant was fined 40 pounds for making, in court, the following statement: [25]

> The deist is anathematised, because he cannot believe that some traditions, handed down among the Jews and the Christians, are a divine revelation, . . . Now it so happens, that the deist considers this collection of ancient tracts to contain sentiments, stories, and representations, totally derogatory to the honor of a God, destructive of pure principles of morality, and opposed to the best interests of society.

Probably because of the Virginia struggles and of the Statute for separation of religion and state, that commonwealth enacted no blasphemy statute, but fourteen other states each passed or retained such a law. It is out of place in Rhode Island in the light of the biography and writings of Roger Williams. Still there and in Delaware the statutes make "blasphemy" a crime, with out defining the term. The legislators in the Dakotas when drafting a blasphemy statute included the following sentence:

[25] Rex v. Davidson, 4 B. & Ald. 329, 106 Reprint 958. The defendant later on said, "The bishops are generally skeptics," and for this he was fined a further 40 pounds. The case is discussed in Hypatia Bradlaugh Bonner, *Penalties Upon Opinion* (Watts & Co., London, 1913).

> If it appears beyond a reasonable doubt that the words complained of were used in the course of a serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy.

Oklahoma in adopting the statute of the Dakotas in 1890 adopted also the proviso above quoted. Its value to an accused is impaired by the rule that the burden is on him to prove "beyond a reasonable doubt" that he spoke "with intent to make known . . . opinions," etc. In fact he can prove it, he being the best witness, but even then religious jurors may arbitrarily give a verdict against him. They, too, may be instrumentalities in religious tyranny. They object to any reflection on the verity of their own doctrines, privately held, and object with indignation, and hatred. It could have been to discourage such tendency on the part of believers that Thomas Jefferson wrote:

> It does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.

While jurors have antipathy toward opponents of their respective creeds, in some degree and with some exceptions, they are not as persecutive as are the instigators of prosecutions of anti-religious speakers. In each of three trials of William Hone in 1817, for publications political as well as profane, the jury returned a verdict of Not Guilty, in spite of encouragement from judges to do the contrary.[26]

On the other hand, the jury in Holyoake's case manifested more cruelty than the prosecutor or his witness. He had finished a lecture on Home Colonization and related economic questions. A local preacher thereupon heckled him with questions on the necessity of churches and on duty to God. Mr. Holyoake was provoked into making the following reply:

> Our national Church and general religious institutions cost us, upon accredited computation, about twenty millions annually. Worship thus being expensive, I appeal to your heads and your pockets whether we are not too poor to have a God. If poor men cost the state as much, they would

[26] James Routledge, *Chapters in the History of Popular Progress* (1876), chapters 16-18; Bonner, *Penalties Upon Opinion*, 37, 38.

> be put like officers on half pay; and while our distress lasts I think it would be wise to do the same thing with deity. Thus far I object, as a matter of political economy, to build chapels in communities. If others want them, they have themselves to please; but I cannot propose them. Morality I regard, but I do not believe there is such thing as God.

Justice Erskine told the jury that if they had a reasonable doubt that the words "were uttered with levity, for the purpose of treating with contempt the majesty of Almighty God," they should give him the benefit of the doubt and find him Not Guilty. The verdict was otherwise, and because the judge thought the words "have been uttered in the heat of the moment" the sentence was for six months' imprisonment, not the ordinary three year term.[27]

Mr. Holyoake recounts the following incident at the time he was leaving home for trial:

> My little daughter, Madeleine, ran from her mother's knee to the door, when she found I had gone, and called after me down the street. Her sweet, clear voice arrested me. I looked back, and saw her dark, black eyes gleaming. I never met her glance again, nor heard her voice any more.

Writing of his imprisonment, he says:

> Word was sent me that my child was ill, and then a letter came saying she was dead. . . . The sole income at home was from subscriptions from friends in various parts of the country, . . . A few days before the fever took the child, her mother was carrying her through Bull Street, Birmingham, when she cried from hunger for a bun in a window. There was no penny to buy it, . . .

Charles Bradlaugh died with the comforting hope that his daughter, Hypatia, would carry on the struggle for intellectual liberty; George Jacob Holyoake was deprived of that boon.

[27] Holyoake, *Sixty Years of an Agitator's Life* (1893); George Jacob Holyoake (1817-1906) was an agnostic but preferred the word Secularist. The trial in question is also discussed in Holyoake's pamphlet entitled *Last Trial by Jury for Atheism.*

CHAPTER IX

SPEECH WAS NOT FREE

IN England and elsewhere prior to the 20th century, governmental aid to propagators of creeds brought about death or imprisonment not only to Secular speakers and writers, like George Jacob Holyoake, but also to religious men like the precursors and founders of Unitarianism. The oldest pretended excuse for suppression of speech was the assumption that to dispute doctrines relating to the divinity of Christ would tend to incite riots because of arousing anger of believers who would hear the denying, heretical, or "blasphemous" declarations. An American court itself so argued, and said that the "mob" would be formed from "the great mass who have been educated in the Christian's belief," and would do "as outraged and insulted men have in all ages been accustomed to do."[1] Why "outraged"? A Democrat could denounce and ridicule Republican "High Tariff" and nothing would happen. But on questions relating to the Trinity the doubter usually, like Senator Sumner, remained silent as a matter of expediency. That, of course, did not disturb *him*, for he had other causes to study and defend, but an Ingersoll would have felt the pressure. Illustrative cases will be mentioned on the point, among others, that there have been *some* times and places where the speaker or writer ought to have been unmolested.

In the case last cited the appellate court devoted much space in reply to Thomas Jefferson's argument against the pseudo-maxim that "Christianity is a part of the law," but was silent about his paramount principle that "to restrain the profession of prin-

[1] State v. Chandler, 2 Harrington (Del.) 553 (1839).

ciples on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty." [2]

There could be no worse judicial tyranny in aid of religious censorship than that exhibited in the opinions which upheld convictions of deistic, and other speakers as blasphemers, which reminds of Jefferson's words ". . . judges accomplices in the frauds of the clergy, . . ." In practically every case conviction was made certain by reason of the prior action of the government in doing what critics of the *McCollum* decision still want done, namely to recognize as true certain doctrines considered fundamental, and all the Old Testament stories, and all the New Testament miracles. This reminds of the *Woolston* case (1729) mentioned in previous chapters.

In the *Mockus* case in Maine in 1921 the speaker had committed no breach of the peace, for the reviewing court itself said that "as he spoke his auditors laughed and clapped their hands." [3] The fact that he spoke in a foreign language reduced still more the harm, if any, of the lecture, and a prosecution served no useful purpose within the county or state.

As if anticipating that anti-religious lectures would make an audience laugh, rather than fight, some blasphemy statutes make it a crime to "ridicule" certain writings and doctrines presumed to be sacred to believers. Ordinarily there is neither ridicule nor rancor at a Rationalist lecture. Justice Kernochan, of a New York court, observed that the "atheist" Charles Smith conducted himself "in a perfectly orderly manner." [4] The lectures of Frances Wright in 1829 seem not to have been criticized as to form. She defined religion as "a belief in, and homage rendered to, existence unseen and causes unknown," which is as ambiguous as some orthodox formulas.

The safest "blasphemy" is that cautiously written in mild words by one who has strong friends. Nothing happened to Herbert Asbury for publishing *Up From Methodism*. It is safe to

[2] Quoted and approved in Reynolds v. U. S., 98 U. S. 145, 163 (1878).
[3] State v. Mockus, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871 (1921).
[4] Peo. v. Smith, 255 N. Y. Supp. 528 (1932).

write a heavy and high priced book which a man with a subsistence wage would not buy. Nothing happened to H. L. Mencken for authorship of *Treatise on the Gods*. It may by this time be legally safe to say anything anywhere, though not physically safe.

In 1859 John Stuart Mill published the *Essay on Liberty*, which had some influence on the *policy* of judges, for thereafter, and in 1883 came the judicial instruction to juries to the effect that "even the fundamentals of religion may be attacked" if the language used does not offend. Just as the numerical strength of drinkers caused the repeal of Prohibition, so the increasing numbers of "blasphemous" scholars made it necessary to limit prosecutions and proceed only against those who could be complained of on the ground of provocative language. Moreover the educated blasphemers were eminent clergymen in many cases. On this point authors cite the seven contributions to *Essays and Reviews* in England in 1860.[4a] The law of *Woolston's* case (1729) had to be ignored.

After 1883 it remained dangerous for a lay Rationalist to speak in words that would be effective with people generally. In 1927 Ernest V. Sterry at Toronto, Canada was prosecuted as for blasphemy. He was editor of the *Christian Inquirer*. His language offended some one, possibly all the Fundamentalists. The trial judge told the jury: [5]

> Probably nothing is more sacred to us than our religion. . . . All that we have in this world worth having we believe comes from God. We look to Him also for our salvation in the world to come, after we have passed out of this life.

All that sounds as if a sectarian was speaking the views of his own sects, but the judge was talking *law;* the jury was being instructed. In the same way he continued:

> Our conception of God is so much a part of every life that it is an integral part of our national life. The Bible, the Holy Scriptures, are to us the revelation of God's will concerning us and all His people. We look

[4a] John Morley, *Life of Gladstone*, v. 1, p. 597.
[5] *N. Y. Times*, March 16, 1927.

> upon the Bible as the basis of every good law in our country. It is to us the dearest and most precious book in the world.

From the foregoing it appears that there was no concession of the fact that many people, even in Toronto, have and had opinions inconsistent with such instruction to the jury. Finally the judge said:

> We allow that any person may disbelieve in God and the Bible and may express that belief in language or by writing. We insist, however, that in doing so the language or writing must be couched in *respectful terms.*

This implies a recognition of the old "breach of the peace" doctrine which was devised on the assumption, practically correct, that believers are disposed to commit a breach of the peace and an assault against one contending against the presumed verity of their own doctrines. The Golden Rule is not respected by them, in that connection, for they have not taken care to speak only "in respectful terms" of unbelievers. They have applied the epithet "infidel" even against silent Unitarians and peaceful Universalists.

Militant believers practiced rowdyism at English Secularist meetings. They did not spare from their terrorism even the gentle Annie Besant.[6] It should be noticed that in the Toronto judge's concluding paragraph of instructions to the jury there is, in effect, a boast that his own sect is in power, as if it were the government itself, that it will inflict penalties upon any person who denies its doctrines in language not satisfactory to it, and that it will not be difficult to find an unbeliever's words not to be "in respectful terms." When Jefferson and Madison were living, the law had not developed so far as to permit even "respectful terms" in speech against doctrines. Moreover, "respectful terms" might have aggravated the alleged crime, for what was punished in Peter Annet's case (1763) was effective prose which tended "to shake the foundations of the Christian religion, and of the civil and ecclesiastical governments established in this kingdom." Presumably Madison in 1789 knew of that case, and also of the prosecution of Jacob Ilive in 1756 which was based on the ground, among

[6] John Edwin McGee, *A History of the British Secular Movement.*

others, that his remarks on Sherlock's sermons tended "to cause the truth of the Christian religion to be disbelieved. . . ."

While a conviction for blasphemy is apt to be sustained, or sought to be upheld, on some theory involving a hypothetical breach of the peace, in practically all of the past cases there was no disturbance of the peace, but some one complained for spite or for other reasons. Any law, or reason for it, permitting the complaint, was originally devised for the general welfare, the sponsors claimed, but at the same time it protected vested interests and helped possessors of power to retain their advantages. The rulers argued for suppression of speech. The Mussolini of Italy, lately adored by some of the critics of the *McCollum* decision, has been quoted thus: [6a]

> But liberty, gentlemen, must not be converted into license. What they ask for is license, and this I shall never grant!

On the other hand, men who wanted to improve sociological conditions and found it necessary to plead for reform, have argued for the principle of free speech. The federal judge who quoted Mussolini also quoted, on the side of liberty, the following from the historian W. E. H. Lecky:

> If persecution is unnecessary in the defense of truth, it has a fearful efficacy in preventing men from discovering it; and when it is so employed, as infallibility does not exist among mankind, no man can assuredly decide. For truth is scattered far and wide in small portions among mankind, mingled in every system with the dross of error, grasped perfectly by no one, and only in some degree discovered by the careful comparison and collation of opposing systems.

Jefferson and Madison took the free speech side, and put the Constitution there too, but still speech was not free in fact.

In 1886 Charles B. Reynolds was not given the chance to speak in an orderly or any other manner. He was an ex-minister of the gospel and intended to deliver lectures in Boonton, New Jersey, which would have been of a deistic or Unitarian nature. A number of orthodox Christians, apprised of his intention, formed a mob and pelted him with stale eggs, destroyed his tent, and sought to

[6a] Clark, J., in C. I. O. v. Hague, 25 Fed. Supp. 127, 133, 139.

assault him. He then went to Morristown and circulated pamphlets.

If Mr. Reynolds had been prosecuted for his efforts to speak at Boonton, a conviction would have been upheld under the ancient "breach of the peace" formula. The Committee on the Bill of Rights, of the American Bar Association, considered the applicability of such a doctrine where applied to a C. I. O. speaker. It said (307 U. S. 679):

> The real question at issue is whether any threat of disorder, even though only by opponents of the speakers, excuses denial of permits. If so, the right of free assembly will have become a mockery.
>
> To "secure" the rights of free speech and assembly against "abridgment," it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small minority of persons hostile to the speaker or to the views he would be likely to express.

Mr. Reynolds was tried for blasphemy on account of his pamphlets circulated at Morristown. The full text of Col. Ingersoll's speech in defense is still in print. He there said:

> I deny the right of any man, of any number of men, of any church, of any state to put a padlock on the lips—to make the tongue a convict. I passionately deny the right of the Herod of authority to kill the children of the brain.

Col. Robert G. Ingersoll (1833-1899) was fortified by his prestige as a lawyer and especially as a Republican. He was not, therefore, molested by prosecutions for alleged "blasphemy," but the possibility was not overlooked by religionists in power. After he delivered a lecture in Delaware, Chief Justice Comegys instructed the grand jury on the subject of blasphemy, as if to serve notice that Mr. Ingersoll would be indicted if he again entered the state.[7]

Freedom of opinion, so well protected by the *McCollum* decision, is concomitant with the right to defend that opinion. Such right has recently been rescued from further abridgment,

[7] Macdonald, *Fifty Years of Freethought.*

for the time being, by the later decision of the *Terminiello* case.[8] There a *religionist* (not an "infidel") was the prosecuted speaker, and he had used words actually insulting, e.g., "And nothing I could say tonight could begin to express the contempt I have for the slimy scum. . . ." The Supreme Court considered his speech in its entirety, and the majority of Justices declared, among other things:

> The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, . . . or even stirs people to anger. . . .

This time it was not, as in the *McCollum* case, an "atheist" who secured judicial aid for intellectual liberty for future speakers and minorities, but it was a "director of . . . . The Union of Christian Crusaders." This is not to admit that there was much "intellectual" material in the address legalized. No one denies that the majority opinion in the *Terminiello* case weakens the authority of the Pennsylvania opinion which made it a crime for a speaker to say that "the Holy Scriptures are a mere fable." [9]

Thomas Jefferson could have been prosecuted for blasphemy if he had spoken to an audience the words he wrote in private letters about Trinitarian doctrines. This is not information; it is a reminder. And he would have been complained against, for his words did provoke religious wrath when discovered. On the publication of the *Memoir*, etc., by Randolph, the *New York Observer*, a Presbyterian journal, said:

> . . . Mr. Jefferson, it is well known, was never suspected of being very friendly to the orthodox religion, but these volumes prove not only that he was a disbeliever, but a scoffer of the very lowest class.

The English cases, cited in preceding chapters, upholding suppressions of speech against prevailing doctrines, were finally over-

[8] Terminiello v. City of Chicago, 337 U. S. 1 (May 16, 1949).
[9] Updegraph v. Com., 11 S. & R. (Pa.) 394.

ruled by the House of Lords in 1917,[10] and the successful litigant was an atheistic society. England had her *McCollum* decision 32 years before we did, but even then it was 300 years overdue, considering the history of English deism.

Some reader may still wonder how the *McCollum* decision has anything to do with free speech. The explanation is that the First Amendment, as construed by that decision, forbids the government from officially recognizing or declaring as true any particular religious doctrine. It follows that neither the state nor the federal government can authorize the imposition of criminal penalties upon a person for speaking or writing in denial of the alleged verity of particular doctrines. In other words, the *McCollum* decision abolishes the common law crime of blasphemy, or rather makes it more certain that the pretended crime does not exist.

The foregoing paragraph may be agreed with by critics of the decision, while they still may claim that the First Amendment does not forbid support of all sects without discrimination by recognition of some doctrine common to all. The prior chapters herein were intended to disprove that claim. The Rutledge opinion in the *Everson* case had, in effect, the same purpose. So does Dr. Dawson's *Separate Church and State Now*. Great as may be the amount of argumentative raw material in possession of the enemies of the *McCollum* decision, its friends have the support of Jefferson's writings, and of Madison's deliberate words: "Strongly guarded . . . is the separation between religion and government in the Constitution of the United States, . . ."

[10] See comment in 31 *Harvard Law Review*, 289, 291 (1917).

CHAPTER X

UPHOLDERS OF CONSTITUTIONAL SEPARATIONISM

WHATEVER Jefferson did in public and in private life to separate government from religion was for the purpose of minimizing oppressions of non-religious and anti-religious people. His unguarded expressions are consistent with that conclusion. He knew that according to human experience it would be futile to plead with religionists in office to grant intellectual liberty to those without religious belief. He never undertook so to do. Instead he coined various phrases, each in a form that would conceal his secular intent, and thus avoid antagonizing militant religionists. The latter saw nothing to criticize in "hostility against every form of tyranny over the mind of man," notwithstanding it was the tyranny of earlier defenders of the faith over minds that was most familiar to historians. Jefferson knew that the general idea of hostility toward tyranny would ultimately be found applicable for the protection of "infidels" like himself, but it was not expedient to say so then.

When speech was not free, it was practically impossible to induce the rulers to grant or concede speech to their critics or opponents. They claimed that in preventing discussion they were killing only incipient "error." Jefferson sought to weaken the position of the oppressors by launching the expression "error of opinion may be tolerated where reason is left free to combat it." He wanted the "error" of hated minorities to be given a chance to "combat" with the "reason" of the governing groups, well knowing that in many cases intelligent people would find out that

reason actually is on the side of the alleged "error." Jefferson had been using his own reason, and on the publication after his death of a collection of his writings the *New York Observer* declared that he had been "not only . . . a disbeliever, but a scoffer of the very lowest class." The phrase "frauds of the clergy" is Jeffersonian; he probably knew that one of the "frauds" was the propaganda that nonbelievers constitute a low class and such of them that defend their unbelief are scoffers of "the very lowest class." Daniel Webster used the same propaganda trick in the *Girard* will case, his words being "lower and *vulgar* class" (43 U. S. 163; 2 How. 176).

Jefferson suggested to a group of Baptists that they were believing with him that "religion is a matter which lies solely between man and his God." The idea if developed and applied would compel believers to worship privately. The same idea conflicts with the desires of the self-appointed leaders; that is, it tends to support Madison's doctrine of separation of government from religion, which doctrine would prohibit worship through, by, or in the name of, the State or some governmental agency. That kind of worship is a form of coercion upon nonworshipers to pretend to be joining in the public worship, in order to escape being stigmatized as a "lower and vulgar class."

Jefferson knew the English prosecutions for sales of books not approved by orthodox Bishops. He perceived the falsehood of judicial declarations to the effect that nonbelief in prevailing doctrines would destroy the government. He therefore placed in his Virginia Statute the clause reciting that "to restrain the profession and propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, . . ." This included a sop of appeasement to the clergymen, including the "Presbyterian clergy" he later denounced, by the pretense of protecting only "*religious* liberty." The reason for the doctrine was that a restraining judge would make his own private opinions the rule of judgment, and condemn all other opinions, which reason favors speech for anti-religious opinions also. The "overt act" doctrine is concomitant. Where national defense is involved, Jefferson's idea is modified

by the "clear and present danger" doctrine, but otherwise the Virginia doctrine is strengthened, for according to the *Terminiello* case speech on peace time subjects is free even where it stirs people to anger.

Jefferson himself did not invent the free speech and overt act doctrine; rather he clarified it, after borrowing it from the writings of Furneaux, quoted elsewhere in this book. The idea of free speech could have been derived also from Roger Williams, *Bloody Tenet of Persecution*, wherein there are passages implying that it is an easy pretense of persecutors to cry fear of disturbance of the peace when they suppress dissent from their doctrines. There is argument to the effect that in the long run peace will be more lasting, because more intelligently conditioned, where all claims of truth are given full freedom to be heard.[1]

What Jefferson did in office to enforce the principle of separation of government from religion has been mentioned in Chapter II.

Congress has not often been appealed to in aid of religion, chiefly because state and local governments were disposed, and better able, to appease clergymen. The First Congress provided for chaplains, but it did pass a secular act when it prescribed a form of oath of office, or an affirmation, which omitted the ancient phrase "So help me God." From time to time there were efforts to secure proposals or adoption of a "God-in-the-Constitution" amendment. In opposition, *The Index* sponsored a petition urging Congress to keep inviolate the principle of separation of Church and State. Senator Sumner introduced that petition, which contained 35,000 names.[2]

Sumner, like Madison and Monroe, refused to reveal, publicly, what he thought of sin, hell, salvation, and related subjects, which reticence would imply nonbelief. But good believers, too, from time to time joined in efforts to keep government separate from religion. In 1891 they caused the Breckenridge "Sunday Rest Bill"

[1] The book is approvingly mentioned in Dr. Joseph Martin Dawson, *Separate Church and State Now*, p. 126. It is quoted in Schroeder, *Constitutional Free Speech*, App. 430-434.

[2] Warren, *American Freethought*.

to be pigeon-holed. In 1890 the Senate laid on the table, without further action, a proposal for an amendment to the constitution so as to provide that each state shall establish a system of public schools which would educate in "the principles of the Christian religion." There were Christians among the men who defeated the bill for the exclusion from the mails of publications "which are represented to be a reflection on any form of religious worship." There is nothing anti-religious about Madison's principle of "separation between religion and government." Protestant clergymen, in increasing number, approve it.[3]

Rationalists of America have a profound respect for the memory of George Washington. Whether Joel Barlow, friend of Thomas Paine, who negotiated the Treaty with Tripoli, was solely responsible for the language of the instrument, Washington is given credit therefor. Furthermore the famous sentence therein accords perfectly with Washington's private and official secularism. The sentence in question is found in Article XI, and contains the clause:

> As the Government of the United States of America is not in any sense founded on the Christian Religion; . . .

It has been suggested that the foregoing clause was incorporated in the Treaty as an expedient for appeasing the Turks, "notoriously touchy on religious subjects" (35 A. B. A. J. 606), but it spoke the truth nevertheless. There was need for expediency, of course, for the Turks had reason to distrust any government professing to be Christian. If they had legal scholars, they would have known that English and American statesmen were familiar with the following law as declared by Lord Coke: [4]

> All infidels are, in law, perpetual enemies (for the law presumes not that they will be converted, that being a remote possibility), for between them, as with the Devil whose subjects they be, and the Christians, there is perpetual hostility, and can be no peace.

That was said in 1609, and might have been unthought of in 1796, but the Biblical passages on which Coke relied were still

[3] Dr. Joseph Martin Dawson, *Separate Church and State Now* (1948).
[4] Calvin's Case, 7 Co. Rep. 17b, 77 Reprint 397.

authoritative with Christians in Washington's time. The hatred of "infidels" was supported by that passage in II Corinthians 6:15 containing the words: "and what concord hath Christ with Belial? or what portion hath a believer with an unbeliever?"

There is a vast amount of undisputed evidence that Washington was not a Christian but a Deist,[5] and possibly to obscure that fact some one many years ago began to publish what became commonly known as "Washington's prayer." It appeared on a bronze tablet in St. Paul's chapel, where Franklin Steiner, author, noticed it in 1925. It concludes with the words:

> "Grant our supplication, we beseech Thee, through Jesus Christ our Lord. Amen."

Most honest biographers concede that Washington did not, and would not, use such words under any circumstances, and as a Deist could not. Yet the alleged prayer was published in the March 1933 issue of *National Republic* and in the 1930 issue of *World Almanac*. We place in parallel columns the respective explanations of the publishers:

Mr. Beatty in National Republic:	*1930 World Almanac, p. 906:*
"When he heard of the signing of the Declaration of Independence" (Washington wrote out the) "prayer."	"This prayer, it is said, was made by Washington at St. Paul's Church, following his inauguration in the old Federal Building on the North Side of Wall Street, facing Broad Street."

So we have two conflicting lines of "authority" for the authenticity of the alleged "prayer." The truth ought to, and does, appear in the writings of Washington as collected by the U. S. George Washington Bicentennial Commission. The writings were published by authority of Congress. The only clue to this "prayer" in the Index is the line: "Prayer, origin of so-called Washington's 26.496." So it is just a "so-called" prayer. Vol. 26, page 496 simply quotes the famous 1783 letter to the Governors.

[5] See sermon of the Rev. Dr. Wilson on "Religion of the Presidents," published in 1831 in the *Albany Daily Advertiser;* Franklin Steiner, *The Religious Beliefs of Our Presidents;* John E. Remsburg, *Six Historic Americans;* Rev. Bird Wilson, *Memoir of Bishop White.*

Judge Buffington quoted the same paragraph as proof that Washington "believed in the Divinity of Jesus," [6] but Washington's words were as follows:

> I now make it my earnest prayer, that God would have you, and the state over which you preside, in His holy protection; that He would incline the hearts of the citizens to cultivate a spirit of subordination and obedience to government; to entertain a brotherly affection and love for one another, for their fellow-citizens of the United States at large, and *particularly* for *their brethren who have served in the field;* and finally, that He would most graciously be pleased to dispose us all to justice, to love mercy, and to demean ourselves with that charity, humility and pacific temper of mind which were the characteristics of the divine author of our blessed religion, and without an humble imitation of whose example in these things we can never hope to be a happy nation.

The italicized words were not placed in the alleged "prayer" as occasionally published, and they do not appear in the "prayer" as printed in 33 *Am. Bar Assn. Journal* 658 (July, 1947).

George Washington signed the Constitution as the officer presiding at the convention and as deputy from Virginia. The sponsors of the Christian Amendment Movement now assert that the omission of the name of God and of Christ from the constitution "was designed" and that many of the statesmen in the convention "were of the opinion that government is a purely secular thing." The past and present claims to that effect seem correct, as does the recital in the Treaty with Tripoli.

Washington's Farewell Address is frequently quoted for one purpose or another, but it nowhere uses the word "Christian" or the name "Christ." Often the present plotters for governmental aid for the Christian religion use Deistic terms, and the term "religion" in a way satisfactory to Rationalists, at least to Unitarians and Universalists, but the aid sought is actually for the persecutive doctrines. This seems admitted by the literature of the Christian Amendment Movement, and the language of House Joint Resolution 181 introduced in the 81st Congress, 1st session, proposing an amendment which would add a new Article to the Constitution and contain the words:

[6] Joseph Buffington, *The Soul of George Washington* (Philadelphia, 1936), pp. 139-140.

> This Nation devoutly recognizes the authority and law of Jesus Christ, Savior and Ruler of nations through whom are bestowed the blessings of Almighty God.

President Andrew Jackson, a good Presbyterian, refused to adopt the suggestion of the General Synod of the Reformed Church that he appoint a day of fasting, humiliation, and prayer. He also refused to issue a Thanksgiving Day Proclamation. President Taylor also refused, stating that he thought it proper to leave the subject "in the hands of the Governors of the several states." [7]

Helen Nicholay wrote of "The Boyhood and Youth of General U. S. Grant" in the Sept., 1909, issue of *St. Nicholas Magazine*. In her article she quotes from a letter written by Grant while at the Military Academy. Some of his language was:

> They give a man one of these "black marks" for almost nothing. . . . A man by the name of Grant . . . got eight of these marks for not going to church. He was also put under arrest so he cannot leave his room for a month.

Some biographers say Grant "failed to attend chapel" and was "placed under arrest." Mr. Steiner, on the authority of Brown's *Life of Grant*, p. 329, says that Grant's letter was to his cousin, McKinsey Griffith, Sept. 22, 1839. So it could be that General Grant had some relevant memories when he delivered his speech before the Army of the Tennessee at Des Moines, Iowa, in 1875, and used the words: "Keep Church and State forever Separate." But Mr. Steiner on the authority of Packard's *Grant's Tour Around the World*, p. 566, says Grant's speech was inspired by "the clamor for set religious exercises in the public schools, . . . from Protestant denominations."

General Grant needlessly conformed to conventionality by professing to oppose "Atheistical tenets." There are no such tenets, and no dogma that can be so described. There are theological "tenets," and if one person, whether a moron or a scholar, finds evidence of the verity of a particular tenet to be insufficient or unconvincing, his denial of a doctrine is not the declaration of

[7] Franklin Steiner, *The Religious Beliefs of Our Presidents*, quoting letters of the presidents Jackson and Taylor as published in the *New York Times*.

any counter-doctrine. Many kinds of opinion are "atheistical" according to Fundamentalists, including opinions relating to geology, anthropology and other secular matters. There is nothing, however, to prevent any one from calling himself or herself an "atheist."

Grant's Des Moines speech of 1875 contained wise counsel in these words:

> Let us all labor to add all needful guarantees for the more perfect security of Free Thought, Free Speech, and Free Press, . . . Encourage free schools, and resolve that not one dollar of money shall be appropriated to the support of any sectarian school.

In his message to Congress in 1875 President Grant expressed alarm over the increase in wealth of untaxed religious corporations, and said:

> I would suggest the taxation of all property equally, whether church or corporation.

Justice Rutledge in the *Everson* case refers to that message (330 U. S. 61) and in that connection quotes Garfield to the same effect.

President James A. Garfield was tolerantly religious, and realized that that fact was not inconsistent with his speech in Congress on June 22, 1874, wherein he said:

> The divorce between Church and State ought to be absolute. It ought to be so absolute that no Church property anywhere, in any state, or in the nation, should be exempt from equal taxation; for if you exempt the property of any church organization, to that extent you impose a tax upon the whole community.

Garfield, as Blaine later said, "was emancipated from mere sectarian belief. . . . The lines of his friendship and his confidence encircled men of every creed, and men of no creed. . . ." Blaine himself must have had the same liberality which he approvingly noticed in Garfield.

It is difficult to find many published accounts of instances where a public official joins a minority, or acts alone, in refusing to join others in recognizing, as if in the name of his office or

of the people, some mode of worship or one or more of the religious assumptions of the worshipers. It is generally profitable, politically, to follow the crowd. It is safer to get on, rather than under, a band wagon. Accordingly, page after page of the files of *The Truth Seeker* had to be scanned before the author could find such items as these two: (1) In 1891 a member of the Texas House of Representatives objected to the appointment of a chaplain. *The Waco Day* published the legislator's (Mr. Gerald's) protest;[8] (2) In 1897 Governor Bradley of Kentucky vetoed appointment of a chaplain by the legislature.[9]

More praise than indifference belongs to the official who merely makes a ruling to conform to a judicial decision, for it is possible to attempt, successfully or not, to evade a judgment. Accordingly the files of *The Truth Seeker* also show that in 1891 the State Superintendent of Schools in Wisconsin made rulings based on the *Edgerton* case (44 N. W. 967) and one was to the effect that it would be unlawful to employ teachers belonging to a religious sect which requires and prescribes "a dress or garb significant of their membership therein and consecration thereto."

Judge William Jay put secularism into his judicial office when he instructed a Grand Jury in Westchester County, New York, that "infidels and Christians, and politicians of every name and character, have an equal and undoubted right to publish their sentiments, and to endeavor to make converts to them."[10] He was the son of John Jay.

Judge Jay's instruction, above quoted, seems so elementary as to deserve no attention, but there is circumstantial evidence that it was intended as a rebuke to Justice Kent who had earlier legalized a conviction as for blasphemy, on the authority of early English cases, some of which made it a crime to deny the actuality of the New Testament miracles. Kent opposed the free speech clause

[8] 18 *The Truth Seeker* 120 (Feb. 21, 1891).

[9] Macdonald, *Fifty Years of Freethought*, v. 2, p. 143.

[10] Schroeder, *Constitutional Free Speech* (1916), p. 70. "Abner Kneeland, in 1835, used this charge in his own defense. So he wrote to Judge Jay and received a letter confirming the accuracy of this report, as expressive of his sentiments."

in the convention which formulated the constitution of 1821. Judge Jay's brother, Peter Jay, supported the clause, and it was adopted 47 to 9. However, Kent had his way on another related matter. A proposed article declaring that the judiciary should not declare any particular religion the law of the land was defeated by a vote of 74 to 41 (11 S & R 404).

There are expressions in various judicial opinions which indicate at least a knowledge of, if not respect for, Constitutional Separationism. The most familiar of these is Justice Dunn's: "The free enjoyment of religious worship includes freedom not to worship." [11] In the *McCollum* case Mr. Justice Jackson contributed the line: "The plaintiff, as she has every right to be, is an avowed atheist." Referring to a constitutional provision that "no inhabitant shall be molested . . . on account of his religious opinions," Justice Hines of Georgia observed that an official system of worship "will offend the deists, atheists, and agnostics." He also quoted Roger Williams to the effect that "No one should be bound to worship, . . . against his own consent." [12] It was on constitutional grounds that Justice Clark of North Carolina declared: "If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be absolutely forbidden." [13]

In England in 1883 Lord Chief Justice Coleridge in a case against Foote and Ramsey, prosecuted for blasphemy, surprised the bar by instructing the jury that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy." Possibly he spoke as Jefferson would, that is, as if to minimize the suffering of an accused who might advocate what he himself believed to be true. Judges are disposed to favor that which they themselves deem true. Joseph McCabe classifies Lord Chief Justice Coleridge among the Freethinkers of modern times, stating

[11] Peo. v. Board of Education, 245 Ill. 334, 92 N. E. 251, 252 (1910).

[12] Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334, 1350 (1922).

[13] Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877.

that the biographer of Lord Bramwell quotes a letter of Coleridge wherein the latter says: "Of ecclesiastical Christianity I believe probably as little as you do."

There have been public office holders whose fidelity to the letter and spirit of their respective state constitutions in the matter of separation of government and religion was stronger than any incentive to yield to religious pressure groups. The state legislature of Iowa refused in 1909 to make Good Friday a legal holiday, a significant event in the light of the fact that in some states, including New Jersey, Good Friday is one of the statutory holidays. In 1894 Judge Parker at Lexington, Kentucky, sustained a demurrer to an indictment which charged blasphemy because the accused had published in *The Blue Grass Blade* the following words: [14]

> When I say Jesus Christ was a man exactly like I am and had a human father and mother exactly like I had, some of the pious call it blasphemy.

Judge Parker declared that the Bill of Rights of the Kentucky Constitution recognized "that some had no religious faith" and provided that the rights of none should be diminished on account of belief or disbelief. He further said:

> In the code of laws of a country enjoying absolute religious freedom there is no place for the common law crime of blasphemy. Unsuited to the spirit of the age, its enforcement would be in contravention to the constitution of this state, and this crime must be considered as a stranger to the laws of Kentucky.

In 1917 the Socialists of Waukegan, Illinois, engaged Michael X. Mockus for a lecture, which he delivered in the face of threats of prosecution. Arrest and trial for alleged "blasphemy" followed. Judge Parsons sustained a motion to quash the information. He did so on the basis of an opinion of the Supreme Court of Illinois wherein it was said, among other things, that the citizen has "freedom not to worship." The information charged that the accused had defamed Jesus, his mother, and the Bible.

[14] *Truth Seeker Annual* for 1895; Schroeder, *Constitutional Free Speech* (1916), p. 60; 2 Macdonald, *Fifty Years of Freethought*, 81.

Judge Parsons quoted from the opinion at some length, and observed: [15]

> If our Supreme Court is correct, would not the Jew, lawfully, honestly and freely expressing his opinion that Christ was an impostor, in the language of this opinion subject him to the same charge of blasphemy now against this defendant? . . . under the law, in our judgment, the defendant cannot be held for trial on the charge of blasphemy. . . .

But not too much credit should be given to the judge, for he professed regret that his decision left defendant free, saying:

> From my earliest recollection, my environment has been such that I cannot refrain from saying that I regret that this is true, but the common law of blasphemy under the law in this state is not an offense subject to punishment or prosecution, . . .

When Mr. Mockus came to the little town of Rumford, Maine, a prosecution and conviction followed his lecture.[16] He had also been convicted of blasphemy in the police court of Waterbury, Connecticut.[17] Prior "environment" of judges had some influence.

A good example of official neutrality is the historic opinion of the Federal Communications Commission in *Re Petition of Robert Harold Scott*, July 19, 1946. A legal periodical holds that the opinion "by substantial implication indicated that the conception of freedom of speech required that stations make their facilities available for atheistic propaganda." [18] The opinion contained the following:

[15] 2 Macdonald, *Fifty Years of Freethought*, 467; Schroeder, *Constitutional Free Speech*, 451; *Waukegan Daily Gazette*, March 3, 1917. The court quoted from Peo. v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910), where Jefferson's statute is noticed. That statute is quoted in full in 11 *A. B. A. J.* 418. A brief extract is found in Reynolds v. U. S., 98 U. S. 145.

[16] State v. Mockus, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871.

[17] Schroeder, *supra*, at p. 454; *The Truth Seeker*, Oct. 12, 1918.

[18] Paul M. Segal, "Recent Trends in Censorship of Radiobroadcast Programs," 20 *Rocky Mt. Law Rev.* 366, 376, 377 (June, 1948). The full text of the opinion is found in F. C. C. Mim. 96050 (1946).

The implications of the opinion resulted in a special investigation by Congress. The Select Committee to Investigate the Federal Communications Commission held hearings in Washington, Aug. 31, to Sept. 1, 1948. 2 *The Liberal* 1.

A rule which denies freedom of expression to the professed atheist should certainly be applied with equal, if not greater, strictness to one whose views are, in fact, atheistic but who seeks to deny or conceal his atheism. Thus the necessity arises of making determinations on the basis of personal judgment as to whether views sought to be expressed are, in fact, atheistic. The power then is vested in those making such determination to attach the label of atheism to the believer whose particular belief they may happen to disapprove, and thus of effectively denying the believer the right to express his views. Under such a course, Jefferson, Jackson, Lincoln and others whose names we revere could, today, be barred from access to the air to express their own particular religious philosophies. The first two were denounced with particular vigor from the pulpits of some of the wealthier and better established churches, and the label of "Atheist" was freely attached to Jefferson by those who had come to feel that their favored positions, which were threatened by his social, economic, and political philosophies, were rewards which the Deity had bestowed upon them because of their special virtues and accomplishments.

Judge Eugene O'Dunne at Baltimore ruled against the contentions of the Lord's Day Alliance on questions relating to a Sunday ordinance. He published an opinion which contained historical matter showing the religious tyranny of English judges, reviewing in particular the 1819 case of King v. Carlile. Counsel for the Lord's Day Alliance argued that "Christianity" is a part of the law of Maryland and was established in the Charter of Charles I to Lord Baltimore. To that Judge O'Dunne replied: [19]

"Examining it (Charter) I find this language:

'Treading the steps of his father, being animated with a laudable and pious zeal for extending the Christian Religion, and *also* the *Territories of our Empire*,' etc., the Charter was granted.

"In the last line, we have the element of which Judge Burke speaks in the Heller case, 124 Md., that 'Greed' is at the bottom of all these movements."

Students of the history of Maryland may find that the second Lord Baltimore "found that the success of the colony depended on the admission of Protestant settlers," [20] which is evidence that

[19] Levering, et al v. Ennis, et al, Superior Court of Baltimore, decided March 12, 1932. Affirmed 160 Atl. 8.

[20] Bulletin of the Baptist Joint Conference Committee on Public Relations, Feb. 8, 1949.

there was a practical, and selfish, reason for protecting Protestants in the Toleration Act of 1649 which, incidentally, prescribed death for Unitarians.

Charles Bradlaugh, atheistic member of the House of Commons, did all he could to separate government from religion, as one would expect. Lord Chancellor Haldane, so often extolled by leaders of the American Bar Association, was, when a member of Parliament, one of the 48 who voted for Mr. Bradlaugh's bill to prohibit all criminal proceedings for alleged blasphemy.[21]

Religionists keep a close watch on public officials, especially the Presidents. President Harrison (Benjamin, not William Henry) was notoriously orthodox, a fact which encouraged sponsors (like Senator Blair) of religious bills. But in his Proclamation of Nov. 1, 1888, designating a Thanksgiving Day, he omitted not only the name of Christ but also the phrase "in the Year of our Lord." That small item did not escape the notice and the criticism of his Presbyterian friends. Thereafter the Proclamations were sufficiently pious.

President Wilson made the usual concessions to religionists. Freethinkers were grateful for his appointment of Helen H. Gardener as a member of the U. S. Civil Service Commission. President Lincoln helped the cause of Freethought by giving prestige to the name of Charles B. Waite in appointing him judge of the supreme court of Utah territory in 1862.

As to United States Senators, George E. Macdonald wrote of Charles S. Thomas of Colorado as follows:

> Colorado in those days (1920) was represented at Washington by a Rationalist, Senator Charles Thomas. The senator spoke against the recognition of "God" in the League of Nations Covenant; he made a speech against the resolution of Senator Myers of Montana calling on the president to proclaim a minute of daily prayer, preceded by the ringing of church bells, called the angelus; and in the course of the debate declared: "I have never made any pretensions toward Christianity."

[21] Among the 48 Ayes was R. B. Haldane, the Richard Burton Haldane whose autobiography is reviewed in 15 *American Bar Assn. Journal*, 575 (1929). See also 10 *id.* 723; 14 *id.* 565; 15 *id.* 188.

The text of the bill was based upon one drafted by Justice Stephen in 1884. See Appendix A of Bonner, *Penalties Upon Opinion*. The bill provided also for the repeal of the Act of 9 & 10 Wm. III, c. 35.

It ought not to be necessary to extol separationism in public office, for officers are presumed to support the state and federal Constitutions, but the necessity nevertheless exists for the reason that fidelity to duty is generally unnoticed, or if known is soon forgotten. Once a nationally known politician utters pious phrases he is quoted and requoted as if an oracle had spoken. Webster's words, spoken as a partisan lawyer in the Girard will case in 1844, are solemnly incorporated into a judicial opinion in 1922, 78 years later,[22] whereas Justice Rutledge was compelled to say that "it is a matter not frequently recalled that President Grant opposed tax exemption of religious property as leading to a violation of the principle of separation of church and state." [23] The "Christian nation" dictum of Justice Brewer, published in 1892, is cited in support of religious instruction in or through public schools in 1946,[24] and has been quoted many times during the 56 years of its travels, but Madison's *Remonstrance* lay in oblivion until Justice Rutledge, for the sake of Constitutional Separationism, brought it to view in the *Everson* case.

What could happen when legislators ignore the history of our struggles for separation of government from religion, is suggested by the enactment of the Tennessee anti-evolution statute.

Separationism in public office acts as a brake on persecutive demands of the religionists, and stops the natural trend toward the fanaticism which Fundamentalism encourages. No *McCollum* decision, and no makers of such decision, were present to check the witchcraft persecutions in America. The 11th edition of the *Encyclopedia Britannica* cites reliable historians, one being Upham. Works of such writers are not being reprinted. Ultimately the books may be lost. Upham wrote of the victim Rebecca Nurse:

> In her old age, experiencing a full share of all the delicate infirmities which the instincts of humanity require to be treated with careful and reverent tenderness, she was ruthlessly snatched from the bosom of a loving family, . . . from the side of the devoted companion of her long life, from a home that was endeared by every grateful association and comfort;

[22] Wilkerson v. Rome, supra note 12.
[23] Everson v. Board, 330 U. S. 1, 61.
[24] Peo. v. Board of Education, 394 Ill. 228, 68 N. E. 2d 305, 308.

immured in the most wretched and crowded jails; kept loaded with irons and bound with cords for months; insulted and maligned at the preliminary examinations; outraged in her person by rough handling and scrutiny; and in her rights, by the most flagrant and detestable judicial oppression; carried to the meeting house to receive the sentence of excommunication in a manner devised to harrow her most sacred sentiments; and finally carted through the streets by a route every foot of which must have been distressing to her infirm and enfeebled frame; made to ascend a rough and rocky path to the place of execution, and there consigned to the hangman.

The *American Bar Association Journal* takes pains to make it known that there was no *burning* of witches "in this country" (34 *A. B. A. J.* 960).

CHAPTER XI

BITTER CRITICISMS OF THE McCOLLUM DECISION

MANY citizens felt that their constitutional rights had been invaded by governmental practices which recognized, and therefore aided, one or more of the Fundamentalist doctrines. Briefs were, accordingly, filed in the *McCollum* case by organizations not related to the litigants themselves. Secularists would be the first, of course, to observe that State aid to Trinitarian sectarians was not only discriminatory but it also encouraged persecutions of the non-religious.

Presumably the Court gave due weight to relevant historical facts, such as King James' recognition of the prevailing creed and his order for the burning of Legate. Materials of American history had been previously re-examined in the *Everson* case, and were still remembered when the *McCollum* case was decided. Justice Murphy, friendly to, and familiar with, Catholic literature, joined in the majority opinion, without comment. But the American Bar Association has been imperiously told by its *Journal* that "the ruling in the *McCollum* case was manifestly based, not on law, but on the 'prepossessions' of a majority of the judges." [1]

"Prepossessions" in favor of the *state* court judgment may have been hoped for by the sponsors of the Champaign plan. One reason for conflict of authorities in other school cases is, as the Supreme Court of South Dakota observed,[2] the "inherent diffi-

[1] 34 *A. B. A. J.* 1028 (Nov., 1948).
[2] State v. Weedman, 55 S. D. 243, 226 N. W. 348 (1929).

culty in getting a truly judicial expression because of the personal beliefs and prejudices of the judges making the decisions."

If "prepossessions" entered into the *McCollum* decision they ought not to be complained of, for it satisfies religious groups that are given no preference and does not discriminate against other groups. Heretofore when "prepossessions" influenced opinions, the result was not merely favorable to religionists, but discriminatory against Rationalists, and the doctrine of *stare decisis* made such opinions operative in later cases. In 1897 the Supreme Court slavishly parroted the formula that dying declarations "may be discredited by proof that (declarant) did not believe in a future state of rewards and punishments." [3] Today the same court might not overlook the fact that there are both unknown and eminent persons who not merely reject but abhor the doctrine of eternal agony after death. That situation would invite "prepossessions" to hold that the dying declarations of a Unitarian, or even a Rationalist, are as unimpeachable, on grounds relating to belief, as are those of a man affiliated with one of the largest and most powerful Trinitarian churches. In the past non-believers in hell suffered much from judicial "prepossessions" in favor of the doctrine of "future punishments." Today no federal judge with sociological knowledge and security of tenure would judicially repeat as his own opinion the following words of the Attorney General in Eaton's case: [4]

> . . . he denies the miracles, the divinity, the resurrection, and the ascension of our Saviour. . . . Ought not he be called on to answer for so foul a crime?

If the student of the history of religious tyranny, and judicial oppression in aid of religion, would take the time so to do, he could find much in Howell's *State Trials* which would show many cruelties inflicted as the result of "prepossessions" to carry out the wishes of orthodox religionists. Benjamin Keach was prosecuted for publishing "one seditious and venomous book," and yet he had done nothing but to argue that infants ought not to

[3] Carver v. United States, 164 U. S. 694, 697 (1897).
[4] Eaton's Case, 31 Howell's St. Tr. 927.

be baptized. In other words, it was a crime to print anything inconsistent with the Book of Common Prayer.[5]

For the sake of brevity, it is enough merely to refer to the history of oppressions of the weaker religious groups by the stronger. Of late the older and vociferous denominations are prone to gang-up against "atheists" and thus enjoy a form of "unity." Religious psychology does not change. The spirit of persecution never dies, but what does reduce its manifestation is the growing indifference among the masses toward ancient formulas for securing "salvation," initially lost because "In Adam's Fall We Sinned All."[6] This situation has incited paid and militant religionists to appeal to school boards for "released time" systems. Dean Jaffe repeated their slogan regarding a "widely felt need for religious instruction" when extolling Justice Frankfurter.[7] Catechisms being extremely short and simple, the alleged "need" may be supplied at home. That point is immaterial. We are concerned here with a Constitutional principle and a Court's treatment of it.

Theological concepts have been hurled, as if they were hand grenades, against the *McCollum* decision. Thus one critic writes that there is a "divinity" which "sets the standard" for correct conduct and is the "source" of all rights. We are to accept that, and from it conclude that the *McCollum* decision is wrong in recognizing the plaintiff's right to nonbelief in a "divinity." It is argued, in effect, that because "divinity" is the "source" of all rights it would not permit a denial of its own existence. There is no way of refuting theological slogans other than by history and science.

According to history, "divinity" in its capacity as law giver is a marionette which moves according to the wishes of the rulers. Slaveholders regarded themselves authorized to enslave children of their captives and apply the lash to both old and young. For the temporal tyrant "divinity" became the source of the doctrine of

[5] 6 Howell's St. Tr. 702-710; Theodore Schroeder, *Constitutional Free Speech* (1916) 282, discussing the case of Benjamin Keach (1640-1704), a minister of the Armenian Baptists.

[6] Quoted in Hale v. Everett, 53 N. H. 9.

[7] Jaffe, "The Judicial Universe of Mr. Justice Frankfurter," *Harvard Law Rev.* (Jan., 1949).

"divine right of kings." Bouvier's *Law Dictionary* cites authority from which a reader might infer that the fraudulent slogan was used as an antidote to the equally false ecclesiastical claims to supremacy in government affairs.

At a Red Mass in Boston on October 2, 1948, the "Higher Law" concept was predominant. Courts were advised to give "God . . . His rightful place on the bench beside the judge." [8] That very thing was done by a Tennessee judge, and on the authority of the "higher law" he made invalid and inoperative, so far as he could do so in a minority opinion, any statute or man-made law purporting to authorize a divorce.[9] Other judges grant divorces, and believers in a "divinity" have been among those acting as plaintiffs, without even a thought of Matthew 19:3-10. So man modifies and amends the "higher law," as divorce statutes indicate, without considering what is the "source" of his authority so to do. There is some excuse for the thought that any actual divinity frowns no more on the *McCollum* decision than it did upon Lincoln's Emancipation Proclamation.

At a Red Mass there was a "principal address" that assailed law that "ignores the existence of God as the source of all authority." [10] If it was meant thereby to criticize new case law leaning toward Separationism, obviously the *McCollum* decision was the target. Certain lawyers had already offered to work on briefs "in opposition to the position taken by the Supreme Court in the McCollum case." [11]

At or preceding the Red Mass above mentioned there was a "colorful procession" headed by the Governor, and, the report says, many state and federal officials were in the line of march. Bar association representatives were there. It is not necessary to mention also the Church dignitaries participating. The use of public office, and official titles, in support of a religious demonstration does not seem to be an appropriate way of supporting the First Amendment.

[8] The Red Mass., 32 *Jr. Am. Jud. Soc.* 99 (Dec., 1948).

[9] Lanier v. Lanier, 5 Heisk. (Tenn.) 462 (opinion of dissenting judge P. Turney, citing Matthew 19:3-10 and Blackstone, book 1, p. 42).

[10] The Red Mass, 32 *J. Am. Jud. Soc.* 99 (Dec., 1948).

[11] 34 *A. B. A. J.* 958 (Oct., 1948).

In the *Terminiello* case Justice Jackson wrote of the "technique . . . of mass demonstrations" which "appeals not to reason but to fears and mob spirit." There is something suspicious about religious parades, whatever their purpose. At any rate they remind of the same things Justice Jackson thought of when considering the Terminiello demonstration. In his opinion he said: [12]

> Hitler summed up the strategy of the mass demonstration as used by both fascism and communism: "We should not work in secret conventicles but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but *by the conquest of the streets*. We must teach the Marxists that the future *master of the streets* is National Socialism, just as it will some day be the master of the state." . . . First laughed at as an extravagant figure of speech, the battle for the streets became a tragic reality when an organized Sturmabterlung began to give practical effect to its slogan that "possession of the streets is the key to power in the state."

In the procession to the *Auto de Fe* on Sept. 20, 1540, in Lisbon, the prisoners were driven behind the burners, friars, nobles and men of rank. At the *Auto de Fe* the King sat on a platform lower than the throne of the Chief Inquisitor. After the sentences were pronounced the accused were delivered to the secular authorities to be burned alive. At the executions the mob approved every act of torture committed against any victim, as if a "colorful procession" had inflammatory influence. No elaborate ceremonies attended the burning of Legate in 1611 in England, and there the people were "much startled, . . . pitying all in pain, and prone to asperse justice itself with cruelty." [13]

A Boston lawyer used the phrase "the infamous McCollum decision." [14] In the past independent judges themselves were denounced where they blocked religious aggression.[15] Legislators too have been assailed, as in Connecticut where they proposed to enact a statute permitting persons to testify without danger of exclusion on account of nonfear of hell.[16] Sometimes religionists

[12] Terminiello v. City of Chicago, 69 St. Ct. 894, 904, 337 U.S. 1 (1949).
[13] Thomas Fuller, *The Church History of Britain*, Bk. X, p. 62 (ed. 1655).
[14] 34 *A. B. A. J.* 817.
[15] Baldwin, *The American Judiciary* 314, could have referred to attacks on opinion and judges in State v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902).
[16] *Quarterly Christian Spectator* (New Haven, Sept., 1829).

forced concessions. Dean Wigmore refers to legislative acts which grant a "sop of Mediaevalism" [17] to religionists by legalizing impeachment of a non-religious witness on the ground of his secularism.

Mrs. McCollum's alleged "atheism" provoked prayers for her defeat, and there were pious and joyous predictions that she could never win. Other atheists had suffered judicial disfavor, and one, as a witness, had been "hissed out of court" [18] by spectators. After the final decision came to be in Mrs. McCollum's favor, criticisms of the judgment flew thick and fast, and one was to the effect that the "case is a brazen, vicious attempt to legislate" and that it gives "preference" to "Atheism" as a "religion of negation." [19] The majority opinions in the case are themselves the best evidence of whether there is, or is not, such a "preference," and since all of the Justices have, presumably, religious beliefs, it could not have been their intent to legislate such a preference. The same contributor writes of "courage" of the "prepossessions" editorial of the *A. B. A. J.* It is submitted that if any "courage" is involved in this connection it was that shown by Justices Black and Frankfurter, for their opinions run counter to the wishes of the stronger and more militant pressure groups.

The American Bar Association Journal repeats the allegation that "the four chaplains stood together, holding hands, as the ship went under . . . ," with the further statement that "Maybe there was something in the Dorchester incident which the majority of the Supreme Court missed. . . ." [20] Joseph Lewis in The Freethinker, relying, in part, on the letter of Captain Cleave of March 15, 1948, refutes the story, and shows that it is, as retold, an exaggeration and distortion of the original story which appeared in the New York Times of March 9, 1943, of the *one* chaplain who "was last seen kneeling in prayer before the vessel went down." The Supreme Court properly omitted any reference to any version of the story, especially a false one, and especially in

[17] Sec. 936 Wigmore on Ev. (2 ed.).
[18] Referred to in Stanbro v. Hopkins, 28 Barb. (N. Y.) 265 (1859).
[19] 34 *A. B. A. J.* 958 (Oct., 1948).
[20] 34 *A. B. A. J.* 484.

light of the fact that men were called into the army without regard to their desire, or the lack of it, for aid of chaplains. Such judicial propriety has not always been exhibited, and deserves approval when found. More than a hundred years ago the Supreme Court of Pennsylvania used language implying that "an actress of the opera, Mlle. Maillard," [21] who took the part of the Goddess of Reason was "a naked prostitute." [22]

In world history "burning of witches" was one of the "many practices," but the *Journal* published a letter to the effect that there was no *burning* of witches "in this country." [23] That point is settled. Not so the following expression in a letter published in the same journal: [24]

> . . . a Court which, with Justice Reed dissenting, handed down the *infamous* McCollum decision . . . and played the Communist game.

The Black and Frankfurter opinions there, and the Rutledge opinion in the *Everson* case, play no game other than conformity with the views of Jefferson and Madison. They conformed also to several state court decisions which had upheld constitutional arguments of a denomination now regarded by Communists as its most militant foe.[25] The humanitarian Justice Murphy would not have concurred in any "infamous" opinion, nor would any of his associates.

[21] *Enc. Americana*, title "Goddess of Reason" (v. 12, p. 744).

[22] Updegraph v. Com., 11 S. & R. 394 (1824). Bishop Wm. Montgomery Brown cited Prof. A. Aulard on the best authority on who was the Goddess. Consult also Winifred Stephens, *Women of the French Revolution*.

[23] 34 *A. B. A. J.* 960.

[24] 34 *A. B. A. J.* 815, 817.

[25] E. g. State ex rel v. Board, 44 N. W. 967, 968, 7 L. R. A. 330, 20 Am. St. Rep. 41.

CHAPTER XII

EVOLUTION OF AMERICAN OUTLAWRY FOR OPINION

SINCE the *McCollum* decision tends to insure further emancipation of non-religious citizens, it is timely to refer to the evolution of American outlawry for opinion in some of the older states. Prior to 1797 every one was presumed to be an orthodox believer or a tolerated one, but after that year judges suspected that some men were reading Paine's *Age of Reason*, a book thought to weaken a "dread" [1] of hell. Accordingly a Connecticut court, in 1798, promulgated a rule that "all professed atheists who disbelieve in the being of a God, and his moral government" shall be "excluded from testifying." [2] The first time Paine was mentioned in a judicial opinion or report was in 1827 when Judge Story noticed that a proposed witness "had read Tom Paine's works" [3] and admitted lack of belief in "a future state of rewards and punishments." The judge barred the offered witness with the remark that persons who "do not believe in . . . a future state . . . are not entitled to be sworn as witnesses." Under such a rule a litigant might be denied justice, not for lack of deserving it, but for want of religious belief on the part of his intended witnesses.

In 1820 the highest court of New York declared that "the law

[1] The remarks of the judge pronouncing sentence in Williams' Case, 26 Howell's *State Trials*, 654 (1797) implied that the *Age of Reason* tended to destroy "the dread of future punishment" and it was assumed that this would destroy also the reliability of testimony.

[2] Root's Rep. 569 (1798).

[3] Wakefield v. Ross, 5 Mason 16, Fed. Cas. No. 17,050 (1827).

of England . . . has been adopted" and therefore ruled that Amos Gridley was incompetent as a witness because he had previously admitted "that he did not believe in a future state of rewards and punishments." [4] The results of such a rule were known to, but not regretted by, the judges, as evidenced by the bitter opposition, in 1829, to a bill, in Connecticut, which proposed to dispense with the necessity of any belief in hell.[5]

Clergymen boasted that our government is "Christian in character" as evidenced by "the rejection of the oath of an atheist." [6] The ground of "rejection," however, was not atheism but nonbelief in "a future state of punishments." The owner of property was not permitted to testify against the thief who had stolen the goods.[7] The right to be a witness might be lost not only because of an actual non-fear of hell but also on the contingency that some other person would come forward to testify that the proposed witness lacked belief "in a future state." A man could be disqualified, not by asking *him* about his opinions, but by having some stranger first testify that the former had admitted nonbelief.

In 1809, in a Connecticut case, the court refused to hear the proposed witness himself, after strangers had testified that he did not believe in "future punishments after death." The judges reasoned in this way: [8]

[4] Jackson v. Gridley, 18 Johnson (N. Y.) 97 (1820).

[5] The article in Sept., 1829, issue of *Quarterly Christian Spectator* (New Haven, Conn.) which bitterly assailed a proposed law which would make a witness competent without regard to his belief in a state of future, or after death, punishments, is written in such a style and with such expressions as to make it seem to have been written by the same person who as judge wrote the majority opinion in *Atwood v. Welton*, 7 Conn. 66, which followed the original, not the revised, opinion of Willes, C. J., in Omichund v. Barker, 1 Atkins 21. See Swancara, "Non-Religious Witnesses," 8 *Wisconsin Law Rev.* 49 (Dec., 1932).

[6] In 1856 an eminent Presbyterian clergyman and historian made the statements above quoted, in *Religion in America*, 246. That famous work is cited in Hale v. Everett, 53 N. H. 9.

[7] U. S. v. Lee, 4 Cranch, C. C. 446, Fed. Cas. No. 15,586 (1834). The report says: ". . . he (owner and proposed witness) said he believed Nature to be God and God to be Nature, and that in him we live and move and have our being." Apparently he believed in the "nature's God" mentioned in the Declaration of Independence.

[8] Curtiss v. Strong, 4 Day 51 (1809).

> It would seem to be incongruous to admit a man to his oath for the purpose of learning from him whether he has the necessary qualifications to be sworn. The objection is, that a person offered as a witness can in no case be sworn, because he does not believe in the obligation of an oath, or is an atheist. It would be strange, that the court should immediately admit this man to his oath to ascertain this fact.

The opinion above quoted was approved in Delaware in 1839, and a barred witness was not permitted to requalify himself by declaring that he had abandoned his former secular opinion and was then believing that there "will be a future state of existence, and of rewards and punishments." [9]

Deviating from the 1809 Connecticut practice, a trial judge in Illinois permitted Ira Aldrich to reveal his opinions, and the latter thereupon testified: [10]

> I don't believe in the existence of a God, particularly; can't say whether I believe it or not; I have no belief one way or the other; there may be a God and there may not; never made up my mind on that subject; I don't believe there is a God who punishes for perjury, either in this world or any other; I don't believe anything about it; it may be and it may not; I have no opinion about it.

That was enough to make him a legal outcast for his honesty, but the attorney who needed his evidence on behalf of a litigant sought for some curative fact, but Mr. Aldrich could only add:

> I am certain that there is an obligation on my part to tell the truth when sworn; . . . .

That was still not enough, and in answer to questions from the court the proposed witness said:

> I believe I should be responsible to the civil law if I should testify falsely; and, further, that I should be punished by losing the esteem of my fellow men. . . . I feel obligated to tell the truth aside from the actions of the civil law, and aside from what others may think of me.

[9] State v. Townsend, 2 Harrington's Rep. 543 (1839). The dissenting judge said: "It is easy to perceive the embarrassment under which a very honest witness might labor, if former opinions should be suddenly sprung upon him, unless an opportunity were afforded him to explain those opinions."

[10] The Central Military Tract Railroad Co. v. A. Rockafellow, 17 Ill. 541 (1856).

Still Mr. Aldrich remained disqualified under the laws of Illinois to be a witness for any purpose in any court, and yet a man of the same opinions would be qualified to make the affirmation which the President of the United States may make, under the Constitution, in lieu of an Oath of Office.

Ira Aldrich was barred as a witness. The state constitution of 1848 did not help him. It did not then contain the clause which later appeared in the constitution of 1870, to the effect that "no person shall be denied any civil . . . capacity on account of his religious opinions." Even if such clause had been in effect, the result could have been the same, for the Massachusetts courts held a like provision "has no reference to atheists," [11] meaning that a non-religious person is incapable of having "religious" opinions and is therefore outside of constitutional protection.

When the Illinois case reached the Supreme Court of the state it was still held that Aldrich was incompetent. The court, however, published an opinion which would hold Jews and Mohammedans competent as witnesses, on the ground that to exclude *them* would be "a rule as narrow, bigoted and *inhuman* as the spirit of fanatical intolerance . . ." of Lord Coke's time. If Mr. Aldrich had been a "Mohammedan" he would have been permitted to testify.

According to the 1820 New York decision in the *Gridley* case a Universalist would be as much outlawed as an atheist. A case arose in 1828 in Connecticut where it was objected to a proposed witness that he "professed to believe in the doctrine of the Universalists; that men were punished *in this life* for their sins, but would all be made happy, immediately after death, by their Creator." [12] The highest court of that state held the witness incompetent.

No sect suffered long. When Mr. Scott, the witness in the case last cited, was called at the second trial he was adjudged competent on the assumption that he did believe in future, though not endless, punishments. The same development of law took place in New York, a judge there, in 1823, declaring: [13]

[11] Thurston v. Whitney, 2 Cushing 104.
[12] Atwood v. Welton, 7 Conn. (2 Day 2d) 66 (1828).
[13] Butts v. Swartwood, 2 Cowen 431 (1823).

> Some (Universalists) only deny that the duration of those punishments to be eternal. . . . For aught that appears he believed in the existence of a God and a future state of rewards and punishments. He was, therefore, properly admitted.

Next year there was a further liberalization, as evidenced by the following judicial remarks: [14]

> And however much I regret the existence of a creed (of the Universalists) which may jeopardize the future happiness of its possessor, the rules of law and rights of conscience must not be infringed.

In no case, however, did a court allow an unbeliever to testify because of "rights of conscience," nor was regret expressed regarding his loss of "future happiness." Of him, the same judge said: ". . . and the jury are the proper judges of his *credibility*." The inference was that "credibility" of Universalists, as of atheists, is weakened by non-fear of hell.

In 1830 the legislature of New York passed a law providing that "every person believing in the existence of a Supreme Being, who will punish false swearing, shall be admitted to be sworn, if otherwise competent." [15] That dispensed with the necessity of inquiring what the witness believes as to time or duration of the supernatural punishments. The constitution of 1846 went further and provided that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." Notwithstanding that fact, on January 4, 1875, "in the Marine Court of New York City before Judge McAdam," a witness named Joseph Treat "was denied the right to testify." [16] It was "upon learning that the witness was an atheist" that objection was made, and sustained, as to his competency. The ruling was denounced by the *New York Graphic*.[17]

Until 1903 the New York courts ruled that a jury may treat as incredible the testimony of a non-religious person merely because he did not believe punishments were or could be supernatural.

[14] Walworth, Cir. J., in Peo. v. Matteson, 2 Cowen 432 (1824).
[15] 2 Rev. St. 408, sec. 87.
[16] Warren, *American Freethought*, 180.
[17] Issue of Feb. 2, 1875, and of Feb. 15, 1875, as quoted by Warren, supra.

The learned and vigorous minority opinion of Judge Cullen [18] seems to have ended such practice, even if it was a minority opinion. The new situation resulted not because judges changed their minds but because the successors of the judicial oppressors were more practical, humane, and secularistic.[19]

The old judicial opinions appear at times to be labored for the purpose of concealing the religious barbarities of the common law. Thus the Supreme Court of the United States, in 1897, made the statement that dying declarations may "be inadmissible by reason of the *extreme youth* of the declarant," and as authority for that dictum the court cited *Rex v. Pike*.[20] What did happen in the latter case was that two thugs killed a four-year old girl by beating on the head. Shortly before dying the child made a statement to her mother as to the acts and identity of the assailants. The judicial excuse for excluding that testimony was not the "extreme youth" of the declarant but the fact that the child was presumed too young to have "had any idea of a future state," meaning what was popularly referred to as "heaven." Our Supreme Court also held that the dying declarations of an adult "may be discredited by proof that . . . he did not believe in a future state of . . . punishment." [21] State court opinions were cited as authority. Comment on such law could be lengthy, and may be found elsewhere.[22]

In 1871 the Supreme Court of Tennessee published what would be universally regarded as gross libel if written of and concerning a presumed believer. It said: [23]

[18] Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148 (1903).
[19] E. g., Cullen and Parker, JJ. in Brink v. Stratton, supra.
[20] Carver v. U. S., 164 U. S. 694, 697.
[21] Carver v. U. S., supra note 20.
[22] Swancara, "Assassins of Atheists Assisted," Ch. XIII of *Bad By-Products of Religion;* same discussion in *The Truth Seeker* of Mar. 15, 1938, and in 15 Dicta (Denver) 269 (Oct., 1938). Article on same subject in LXVI *U. S. Law Review* (N. Y., April, 1932), revised and reprinted as Ch. XII of Swancara, *Obstruction of Justice by Religion* (Courtright Pub. Co., Denver, Colo., 1936). Earliest article was "Mediaeval Theology in Modern Criminal Law," 20 *Jr. of the Am. Inst. of Crim. Law and Criminology*, p. 489 (Feb., 1930), quoted in Harry Elmer Barnes, *Battling the Crime Wave.*
[23] Odell v. Koppee, 5 Heisk. (Tenn.) 91.

> The man who has the hardihood to avow that he does not believe in a God, shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him to be *heard or believed* in a court of justice in a country designated as Christian.

It was because of that official pronouncement and many others like it that this writer undertook to refute the falsehood.[24] Professor John Tyndall (1820-1893) proclaimed his opinion that such a man as the above named court described was the very one he would trust most. The court used the word "hardihood" as the equivalent of impudence, and to accuse thus a witness for his honesty when compelled to take the witness stand is a contempt committed by the court itself, judging what has been judicially said of "the man who has the hardihood to" assail the "moral character" of the judge himself. Prof. Wigmore in his monumental work on evidence lists Tennessee as one of the states where legislators felt compelled to throw "a sop of mediaevalism" to religionists by authorizing impeachment of non-religious witnesses. Prof. Wigmore, in that connection, refers to "atheism" as "a belief quite consistent with the strictest sense of moral obligation to speak the truth." [25]

In a Georgia trial the state called as a witness one who had been convicted of murder. Such conviction would impair his credibility regardless of his religious faith. One Justice of the Supreme Court decided that the witness in question ought to have been compelled to answer the question: "Are you preparing to meet your God?" The pretended reason was that if the murderer had a God he would fear not to tell the truth.[26] But the fact remained that the God idea did not frighten him away from murder. In a Missouri case it was the memory of the person slain that was assailed by insinuations that his dying declaration was unreliable because of his not having a God. The murder was a "brutal one." [27] The killers sought to impeach their victim's dying declaration by evidence that he was "a disbeliever in God and in a

[24] *Religion and Crime.*
[25] Sec. 936 Wigmore on Ev. (2d ed. 1923).
[26] Dissenting opinion in Daniel v. State (Ga.), 187 S. E. 36 (1936).
[27] State v. Rozell, 279 S. W. 705, 712.

future state of man." [28] But courts have not permitted anyone to prove that a dying declarant believed "that there may be repentance at any moment before death," [29] a belief that might encourage him to lie audibly first and then silently repent. Nor have courts permitted a witness to be impeached by proof that he could, after perjury, obtain absolution.[30] The discriminations were always against non-religious witnesses.

Legal disabilities of, or legal discriminations against, non-religious persons have been wholly or partially removed in most states. In Arkansas, on the other hand, a lower court in 1928 permitted a prosecution for common law blasphemy against Charles Smith, and does not permit Atheists to testify. The people there fail to make their laws conform to the wishes and statesmanship of Jefferson. He was, in a sense, their benefactor, for Arkansas is within the area of the Louisiana purchase. In Tennessee the Constitution would bar Jefferson from holding any public office because of his non-belief in "a future state of rewards and punishments," a doctrine absent from his Deism.[31]

[28] State v. Rozell, 225 S. W. 931, 16 A. L. R. 400 (1920).
[29] North v. Peo., 139 Ill. 81, 28 N. E. 966, 972 (1891).
[30] Com. v. Buzzell, 16 Pick. (Mass.) 153, 156 (1834).
[31] In State v. Pitt, 166 N. C. 268, 271, 80 S. E. 1060 (1914) the court said: "We know that the Old Scriptures, which is the Hebrew Bible, does not teach a future life, and hence there is absent therefrom the doctrine of future rewards and punishments. Indeed, the New Testament teaches that 'life eternal' came through Jesus Christ." According to that, unless the Tennessee constitution has been very recently changed, Jews, too, are disqualified for public office in that state.

CHAPTER XIII

THE STRUGGLE FOR COMPLETE SEPARATION BETWEEN RELIGION AND GOVERNMENT

SINCE the rise of Christianity there have been many instances of persecution for opinion. To mitigate prevailing and anticipated oppressions, individuals and groups organized to protect themselves. A record of what was done to promote acceptance of non-religious, new or heterodox opinions, and to correct errors in accepted opinions would fill many volumes.[1] What was done to acquire the right of free speech might be written in one book. Heretics were more willing to be burned for their heresies than for the right of any man to express his opinion.

When some of them came to realize the necessity of freedom of speech as an aid to the cause of truth as they saw it, they conceived and put forth arguments of the following nature: [2]

[1] As to Freethought in America, one may consult: George E. Macdonald, *Fifty Years of Freethought* (The Truth Seeker Co., Inc., N. Y.); Albert Post, *Popular Freethought in America* (1825-1850); Sidney Warren, *American Freethought*, 1860 to 1914; and the published works cited in each of the foregoing.

As to Freethought in Europe, there are, among others: Joseph McCabe, *Biographical Dictionary of Ancient, Medieval and Modern Freethinkers;* John McGee, *A History of the British Secular Movement;* J. M. Robertson, *History of Freethought: Ancient and Modern, to the Period of the French Revolution,* in 2 vols.; Samuel P. Putnam, *Four Hundred Years of Freethought;* Adam Storey Farrar, M. A., *A Critical History of Freethought.* Of the last named the author was a clergyman with intent to retard and disparage, not to aid, Freethought, but in doing so he gave a history, or mention, of non-believers whose names are not known to present Freethinkers. From his work one may learn of Celsus, of the second century, still familiar to Catholic theologians.

Since Freethought for a long time took the form of Deism and Unitarianism, the reader is advised to consult, if interested, those titles in the 11th ed. of *Encyclopedia Britannica.* Secularism came later.

[2] Schroeder, *Free Press Anthology* (1909), p. viii.

I. We heretics are biblically correct, therefore we should be tolerated;
II. The Bible commands toleration, therefore we should be tolerated.

The "infidel" Jefferson naturally added what he could, and, among other things, propagated the seemingly appeasing idea that "error of opinion may be tolerated where reason is left free to combat it." That was the equivalent of an appeal to tyrannical majorities to be tolerant of minority opinions, as if he had said to them:

> "I concede you are right, but let those fool cranks say what they please, for their errors cannot become widely accepted. Your reason is bound to overcome such errors, so let error of opinion be tolerated."

Jefferson strove in every possible way to make the principle of freedom of speech applicable to speech in matters relating to religion. Before his time the principle had made some progress with reference to discourses on government, and today our courts still notice Erskine's words: ". . . the liberty of opinion keeps governments themselves in due subjection to their duties." [3]

Jefferson had the same ideas as did the Rev. Philip Furneaux on the policy of permitting any speech regardless of what a magistrate thought of the "tendency" of the doctrines or thoughts expressed. Accordingly the preamble to the Virginia statute was so formulated that under its principles one cannot be justly punished as a criminal merely because he has spoken against sectarian doctrines, even if a jury does find some ill "tendency" of the speech. The Virginia Statute for Religious Freedom, especially its preamble, is in direct conflict with that part of the judicial opinion in Williams' Case [4] which punished one for the sale of Paine's *Age of Reason* on the theory, among others, that the book had a "tendency" to weaken judicial oaths. The principles of the Virginia preamble, which is to say, of Jefferson and Madison, have been ignored in all the reported blasphemy cases,[5]

[3] Grosjean v. American Press Co., 297 U.S. 233, 247 (1936). Milton's *Areopagitica* (1644) is cited in connection with the rise of Unlicensed Printing.

[4] 26 Howell's *State Trials* 654 (1797). See opinion of Ashhurst, J.

[5] State v. Mockus, 113 Atl. 39, and the earlier cases there cited.

but they have been at least partially followed in two unreported cases where the accused was discharged by the trial judge.[6]

The most famous and effective fighter for free speech for Secularism was Charles Bradlaugh (1833-1891). He was great enough to merit the biographical sketch given him in the *Encyclopedia Britannica* (11th ed.). Once (1859) he rented a hall for lectures. When later he came to speak he found himself barred. The courts refused relief for breach of contract, deciding on the assumption that the intended lectures were illegal. No evidence was taken. That was religious censorship in action. First a private party practiced it, and then a court legalized his action. At another time Bradlaugh was arrested after having said no more than: "Friends, I am about to address you on the Bible." He sued the arresting official for wrongful imprisonment, but the court said that the imprisonment was more a benefit than an injury to him. A higher court held, in effect, that utterance of heretical opinions may be prevented even by false imprisonment. On that principle the law would not allow damages against a mob or ruffian thus protecting "religion." Religionists themselves, therefore, made history of some of their own ways of preventing the people from learning of Rationalist opinions held by many educated persons. The history was afterwards written briefly by Bradlaugh's daughter, Hypatia Bradlaugh Bonner, in *Penalties Upon Opinion* (1913). As to cases involving other speakers she made use of Justice Stephen's *History of the Criminal Law*.

From the law reports themselves the student may learn that Charles Bradlaugh, who had been elected to serve as a member of parliament and had been faithful to his trust, was prosecuted for having voted in the House of Commons without first making, and subscribing the prescribed oath.[7] The charge was false, for he had uttered all the necessary words and performed all the required acts in the making of a valid oath. Nevertheless, the court held that simply because he had no belief in supernatural punishments, it was impossible for him to make any oath and, there-

[6] Peo. v. Mockus, in Ill., and Com. v. Moore, in Ky., discussed in Chapter X *ante*.

[7] Attorney-General v. Bradlaugh, 14 L. R. 667 (1885).

fore, he never made one. Due to Bradlaugh, an Act was passed in 1888 which permitted an affirmation not only in "any court of justice," as under the Act of 1869, but "in all places and for all purposes where an oath is or shall be required by law." [8] The act further provides that where an oath has been duly administered the fact that the witness "had no religious belief" shall not affect its validity. Thus Bradlaugh induced the government to give up one of its ancient aids to religion.

In England, the eminent Justice Stephen in 1884 drafted a bill which provided that no criminal proceeding shall be instituted in any court against any person for blasphemy. The text of the bill as introduced by Bradlaugh in the House of Commons contained, among others, the following section:

> 1. After the passing of this act no criminal proceedings shall be instituted in any Court against any person for schism, heresy, blasphemous libel, blasphemy at common law, or atheism.

The bill was rejected on second reading, April 12, 1889. But among the 48 or more members voting for it was Richard Burdon Haldane, who in later years was many times extolled in the *Am. Bar Assn. Journal*.[9] Also Sir Henry Campbell-Bannerman, Henry Asquith, Herbert Gladstone. John Morley was absent but favored the bill.[10] The same bill provided for the repeal of all blasphemy statutes, which should remind that John Adams, our second President, wished that the Massachusetts blasphemy statute would be repealed.[11]

The history of the struggle in England for the principle that any belief ought to be founded on reason alone has been well written by others.[12] As to American freethought, it has been difficult for recent writers to find much relating to its early history.

[8] 51 & 52 Vict. Ch. 46.

[9] 10 *A. B. A. J.* 723; 14 id. 565; 15 id. 188. Autobiography is reviewed in 15 *A. B. A. J.* 575 (1929).

[10] App. A of Bonner, *Penalties Upon Opinion* (1913).

[11] Vol. 10, p. 415, *Life and Works of John Adams* (Boston, 1856). Quoted in Chapter IV, *ante*.

[12] Supra, note 1. Also J. M. Robertson, *A History of Freethought in the Nineteenth Century* (1929).

It first took the form of Deism,[13] and it had three publications: *The Temple of Reason* (1800-1803) was published first in Philadelphia and later in New York. *The Theophilanthropist* (1810-1811) appeared in New York.[14] George Houston edited the *Minerva* in 1822, and started *The Correspondent* (1827-1829).[15] In 1802 Elihu Palmer wrote *The Principles of Nature*. He founded a Deistical Society in 1796.[16] John Fitch, inventor of the steamboat (preceding Robert Fulton), formed, in 1790, a Freethought society called "The Universal Society." After a lecture by a Rev. Mr. Palmer, the Society was denied further use of the hall by its owner.[16a]

The Index, of Boston, was founded January, 1870, by Francis Ellingwood Abbott (born 1836). Something of his opinions, and changes therein, may be gathered from a judicial opinion on matters of law relating to religious societies.[17]

The Boston Investigator was established in 1831 by Abner Kneeland, who later became the accused in a historical blasphemy case in Massachusetts.[18] The following words appeared just below the title on the first page, on issues in 1900:

> Truth, Perseverance, Union, Justice—The Means, Happiness the End. Hear All Sides—then Decide.
> DEVOTED TO THE DEVELOPMENT and PROMOTION OF UNIVERSAL MENTAL LIBERTY.

The last line was interrupted by drawings of about thirteen books, nine of which had a name, as of an author, inscribed thereon. The name "Jefferson" was on one. Another was "Seaver," the name of the editor (Horace Seaver) who served from 1839 to the date of his death, Aug. 21, 1889. Other names accompany-

[13] Herbert M. Morris, *Deism in Eighteenth Century America* (N. Y., 1934).

[14] Irving Levy in 58 *The Truth Seeker* 5 (Jan., 1931).

[15] 40 *The Truth Seeker* 792 (Dec. 13, 1913).

[16] Sidney Warren, *American Freethought*.

[16a] Thompson Wescott, *Life of John Fitch* (J. B. Lippincott, Phila., 1857), pp. 309-312. See also Franklin Steiner, "John Fitch, a Freethinker," 45 *The Truth Seeker* 150 (March 9, 1918).

[17] Hale v. Everett, 53 N. H. 9.

[18] Com. v. Kneeland, 20 Pick. (Mass.) 206 (1838).

ing that of Jefferson were Hume, Voltaire, Hobbes, Paine, Volney, Ingersoll and Kneeland.

The best known Freethought magazine, which still survives, was and is *The Truth Seeker*, founded in 1873 in Paris, Illinois, by DeRobigne Mortimer Bennett. The fifth issue appeared in 1874 in New York City, which has remained the place of publication. Around 1883 Bennett was succeeded by Eugene Montagne Macdonald who remained editor until his death, Feb. 26, 1909. The paper was next edited by George E. Macdonald, who became and for a long time remained a biographee in *Who's Who in America*. Edward Tuck, a contributor to the paper's sustaining fund in earlier years, continued his aid, and later made it possible to publish Macdonald's *Fifty Years of Freethought* (1931). After the last issue for 1936 of *The Truth Seeker*, George E. Macdonald retired from the active management, and Charles Smith became editor. Mr. Macdonald continued to write for the magazine, and was Editor Emeritus, until his death on July 21, 1944.

Charles Smith first became known to the readers by a contribution to the issue of April 7, 1923. In 1925 he with others organized the American Association for the Advancement of Atheism. A certificate of incorporation was denied by Justice Mitchell, but later granted by Justice Ford. Mr. Smith's struggles for legal freedom from religion for non-religious citizens, without compensation for himself, reminds one of Richard Carlile and his family and their work in England. Mr. Smith has been mentioned respectfully in acceptable books,[19] legal articles,[20] and law reports.[21]

The Truth Seeker is published by The Truth Seeker Company, Inc., a corporation organized under the laws of New York. Since the rise of attacks on the *McCollum* decision the magazine has given emphasis to Madison's principle of separation of religion from government. The National Liberal League is a society organized to help preserve the Constitutional Separationism favored by

[19] Mentioned in Charles W. Ferguson's *The Confusion of Tongues* (1928), p. 437.

[20] *A Legal Leper*, 17 Dicta (Denver) 81 (Apr., 1940).

[21] Peo. v. Smith, 142 Misc. Rep. 769, 255 N. Y. S. 528 (1932); Peo v. Smith, 259 N. Y. 48, 180 N. E. 891 (1932); Peo. v. Smith, 263 N. Y. 255, 188 N. E. 745 (1934); Smith v. New York, 292 U. S. 606.

our Presidents Washington, Adams, Jefferson, Madison, Garfield, and Grant.

It is amazing that while so many scholarly books have been written on religion, religions, creeds, doctrines, practices, persecutions, and histories relating to each, very little, comparatively, has been written on the natural right to express honest opinions about any one of the subjects above mentioned. It may be that in America Roger Williams was the first to begin a struggle for such right, and that Jefferson was next. In recent years, 1909 to around 1939, Theodore Schroeder was a valiant champion of free speech.[21a]

Separationism, too, has been neglected, but never overlooked. It received attention in 1876 when in response to a call issued by *The Index* Freethinkers convened in Philadelphia and launched the National Liberal League. It worked for a Religious Freedom Amendment, then assuming that the Fourteenth Amendment did not make the First Amendment applicable to the states. That movement was in opposition to the proposed God-in-the-Constitution amendment sponsored by The National Reform Association. In 1885 the League changed its name to the American Secular Union.

It was in *The Index*, in 1876, that there was first published the Nine Demands of Liberalism which had been adopted by the National Liberal League. *The Truth Seeker* thereafter printed said Nine Demands as its political platform for many years. The demands were as follows:

POLITICAL PRINCIPLES

1. We demand that churches and other ecclesiastical property shall be no longer exempt from taxation.

2. We demand that the employment of chaplains in Congress, in the Legislatures, in the navy and militia, and in prisons, asylums, and all other institutions supported by public money, shall be discontinued.

[21a] "Anything more than an outline of the history of free speech would be a pedantic display of very easily obtainable knowledge. The standard authorities in the Anglo-Saxon countries are . . . in the United States, Constitutional Free Speech, Schroeder; . . ." Clark, J., in C. I. O. v. Hague, 25 F. Supp. 127, 136.

3. We demand that all public appropriations for educational and charitable institutions of a sectarian character shall cease.

4. We demand that all religious services now sustained by the government shall be abolished; and especially that the use of the Bible in the public schools, whether ostensibly as a text-book or avowedly as a book of religious worship, shall be prohibited.

5. We demand that the appointment by the President of the United States or by the governors of the various states, of all religious festivals and fasts shall wholly cease.

6. We demand that the judicial oath in the courts and in all other departments of the government shall be abolished, and that simple affirmation under the pains and penalties of perjury shall be established in its stead.

7. We demand that all laws directly or indirectly enforcing the observance of Sunday as the Sabbath shall be repealed.

8. We demand that all laws looking to the enforcement of "Christian" morality shall be abrogated and that all laws shall be conformed to the requirements of natural morality, equal rights, and impartial liberty.

9. We demand that not only in the Constitution of the United States and of the several states, but also in the practical administration of the same, no privileges or advantages shall be conceded to Christianity or any other special religion; that our entire political system shall be founded and administered on a purely secular basis; and that whatever changes shall prove necessary to this end shall be consistently, unflinchingly and promptly made.

President Grant noticed such demands. After an interview with Stephen Pearl Andrews (1812-1886), a frequent contributor to *The Truth Seeker*, on the subject of taxation of church property, Grant sent to Congress the message which contained the paragraph recommending taxation of all church property.[22] Andrews and William Lloyd Garrison (1805-1879) were Freethinkers in the field of religion as well as upon the question of abolition of slavery.

Susan Brownell Anthony (1820-1906) and Matilda Joslyn Gage (1826-1898), leaders in the Suffrage movement, were also Rationalists, and the latter was author of *Woman, Church and State*. Jane Addams (1863-1935), who shared the Nobel peace prize with Nicholas Murray Butler in 1931, never departed from the Rationalism which her father had taught her. Mrs. Mattie P. Krekel, wife of Arnold Krekel (1815-1888), was a Freethought lecturer. Katie Kehm Smith was another. The names, and the labors, of other

[22] Macdonald, *supra*, note 1, at p. 181 of vol. 1.

Jeffersonian women are mentioned in Mr. Macdonald's two volumes.[23]

From the files of *The Truth Seeker* it appears that the International Congress of Freethinkers held a convention in Chicago, Ill., from Sunday, Oct. 1, 1893, to Sunday, October 8, 1893, inclusive, and that many sessions were presided over by Judge Waite, one time member of the supreme court of Utah. The same Congress planned to hold its 1925 meeting in Rome, Italy, but "the regime of Fascist terror would not permit," and the convention was, for that year, held in Paris.[23a] Mr. Macdonald writes that the International Freethought Federation, probably the same group, held its 1920 congress at Prague, in the new Republic of Czechoslovakia. After the World Union of Freethinkers selected London for its 1938 Congress agitation by Christians was begun against the meeting, and "Moscow" was accused of being interested. A group of priests demanded of the Prime Minister that he prevent the "anti-God Congress." An obscure member of Parliament obtained publicity with a Bill to "prevent the participation by aliens in assemblies for the purpose of propagating blasphemous or Atheistic doctrines. . . ." The campaign had some effect, for when on Sept. 13, 1938, the delegates visited the grave of Charles Bradlaugh they found that the bronze bust had been stolen, and in its place was left this note:

> Judah-Beware. Christian England is rising against you. Beneath this sod lies another.

The American Rationalist Association was organized in Chicago on Feb. 3, 1924. Franklin Steiner, author and lecturer, was for a long time secretary. He died at Milwaukee on January 8, 1945, while on the records of the Department of Old Age Assistance as William Franklin Steiner, "O. A. A. 10361." His lifetime efforts to preserve the principles of Thomas Jefferson impaired, and probably destroyed, his economic security.

Mr. Steiner wrote *The Religious Beliefs of Our Presidents*, dedicating it to Edward Tuck, as if aid had been given by the

[23] Macdonald, *supra*, note 1.
[23a] Macdonald, *Fifty Years of Freethought*, vol. 2, p. 620.

latter, and it probably was. *The National Cyclopaedia of American Biography* says, among other things, the following of Mr. Tuck:

> For forty years he was a contributor to the sustaining fund of *The Truth Seeker*, the Free Thought magazine, and through his generosity George E. Macdonald, its editor emeritus, was able to publish his two volume treatise, *Fifty Years of Freethought.*

The "infidel" Mr. Tuck never wrote on religion. He was a writer on money, in defense of bimetallism. He is best remembered, however, for his endowment of Dartmouth College, and the foundation of the Amos Tuck School of Administration and Finance. He erected a building for and endowed the New Hampshire Historical Society at Concord. Other benefactions are mentioned in the 1938-1939 issue of *Who's Who.*

Histories of popular Freethought and unorganized Unitarianism could be written with respect to any one of several large cities. In Denver, Colorado, Frank Hamilton Rice founded the Liberal Church in 1923. Edwin N. Burdick organized, and delivered lectures for, the Colorado Rationalist Association. Oscar O. Whitenack, who died Oct. 29, 1949 at the age of 79, was a one time Christian school teacher who lost his position because of refusal to yield to "anti-evolution" critics. His writings indicated familiarity with Dr. Andrew Dickson White's famous work. In his last days Mr. Whitenack wrote a Rationalist book, and an Anti-Communist pamphlet. Colorado's one time governor and long a U. S. Senator, the late Charles S. Thomas, was silent about his Secularism while living but left for publication after death his opinions on what Jefferson would call "matters of religion."

Scores, if not hundreds, of other names of Rationalists throughout the land, still living or who were active after 1925, the year with which Mr. Macdonald ends his history, could be mentioned now, but space must be conserved.

CONCLUSION

UNDER the decision of the United States Supreme Court in the *McCollum* case and the concurring opinion of Justice Rutledge in the *Everson* case, it would seem that all the old State court decisions, as well as State statutes and constitutional provisions, inconsistent with the principles proclaimed by Jefferson and Madison are now invalidated.

The author has endeavored to present and uphold the basic principles of Separationism expressed in Jefferson's Virginia Statute of Religious Freedom and in Madison's *Remonstrance* and the Detached Memorandum on "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments." The First Amendment to the Constitution of the United States embodied those principles and the Fourteenth Amendment applies them to the separate States. Madison in his later years, and after much time for reflection had passed, used, both wisely and correctly, the words: "Strongly guarded . . . is the separation between religion and government in the Constitution. . . ."

Appendix

A

THE FIRST AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The First Amendment

The First of the Ten Amendments known as the Bill of Rights (passed by Congress September 25, 1789, and ratified by three-fourths of the States December 15, 1791) reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment

The Fourteenth Amendment, adopted in 1868, makes the First Amendment binding upon the States. It reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix

B

MADISON'S DECLARATION OF SEPARATIONISM

James Madison, the Father of the Constitution, stated: *

Strongly guarded as is the separation between religion and government in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies may be illustrated by precedents already furnished in their short history.

[*See frontispiece for a photostatic copy of this statement in Madison's handwriting.*]

*Madison's "Detached Memorandum" or "Essay" is entitled "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments." It has been reproduced in full in the following publications:

Harper's Magazine, vol. 128, p. 489 (March, 1914), in an article entitled "Aspects of Monopoly One Hundred Years Ago, a hitherto unpublished Essay by James Madison, with an Introduction by Gaillard Hunt, Chief of the Division of MSS., Library of Congress."

William and Mary Quarterly, vol. 3, series 3 (Oct., 1946), pp. 534-568, in an article by Elizabeth Fleet, entitled "Madison's 'Detached Memoranda.'"

The Essay is cited by the court in the Everson case in notes 12 and 13 at p. 12 of 330 U. S.

The original manuscript is now in the Library of Congress, Washington, D. C., among the papers of William C. Rives, an early biographer of Madison.

Appendix

C

THE JEFFERSONIAN "WALL OF SEPARATION"

Thomas Jefferson, author of the Declaration of American Independence, of the statute of Virginia for religious freedom, and father of the University of Virginia, wrote as follows, January 1, 1802, to the Baptists of Danbury, Conn.:

JEFFERSON'S REPLY TO THE DANBURY BAPTISTS

GENTLEMEN: The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

Appendix

D

A BILL TO TAX THE PEOPLE TO SUPPORT RELIGION

[*Seeking governmental aid for religion, the Sectarians in the State of Virginia introduced a measure before the Assembly to levy a tax for the support of all Christian denominations. Though the proposed measure was defeated in 1779, it was offered again in 1784.*

This bill, reproduced below, specially aroused James Madison and Thomas Jefferson, causing the one to write his celebrated pamphlet "A Memorial and Remonstrance" and the other to draft his famous "Statute of Religious Freedom," and culminated in the adoption of the First Amendment to the Federal Constitution.

The Sectarians of today do not advocate measures authorizing the sheriff to collect money from citizens to pay the salaries of teachers of the Christian religion, but they endeavor to use public school facilities and the machinery of the State to propagate their beliefs.]

A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION.

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the day of in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher

of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the day of in the year

A Copy from the Engrossed Bill.

JOHN BECKLEY, C. H. D.

*Washington Mss. (Papers of George Washington, Vol. 231); Library of Congress.**

* This copy of the Assessment Bill is from one of the handbills which on December 24, 1784, when the third reading of the bill was postponed, were ordered distributed to the Virginia counties by the House of Delegates. See Journal of the Virginia House of Delegates, December 24, 1784; Eckenrode, 102-103. The bill is therefore in its final form, for it never again reached the floor of the House. Eckenrode, 113.

Appendix

E

[The following measure, drafted by James Madison in 1784 and extensively circulated, was responsible for the defeat of the Bill to levy taxes for the support of teachers of the Christian religion.]

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS

To the Honorable the General Assembly
of
the Commonwealth of Virginia.
A Memorial and Remonstrance.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." [1] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty

[1] Decl. Rights, Art. 16. [Note in the original.]

towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in ex-

clusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," [1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience." [2] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it

[1] Decl. Rights, Art. 1 [Note in the original.]
[2] Art. 16. [Note in the original.]

disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every

citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that "Christian for-

bearance,[1] love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free

[1] Art. 16. [Note in the original.]

exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government," [1] it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

II Madison, 183-191.

[1] Decl. Rights-title. [Note in the original.]

Appendix

F

JEFFERSON'S BILL FOR ESTABLISHING RELIGIOUS FREEDOM

(Introduced in 1779 and passed in 1786 by the Assembly of Virginia)

SECTION I. Well aware

that the opinions and belief of men depend on their own will, but follow involuntarily the evidence proposed to their minds;

that Almighty God hath created the mind free, and manifested His supreme will that free it shall remain by making it altogether insusceptible of restraint;

that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet choose not to propagate it by coercions on either, as was in His Almighty power to do, but to exalt it by its influence on reason alone;

that the impious presumption of legislature and ruler, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time;

that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical;

that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind;

that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; and therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust or emolument, unless he profess or renounce this or that religious opinion, is depriving him injudiciously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right;

that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing with monopoly of worldly honours and emoluments, those who will externally profess and conform to it;

that though indeed these are criminals who do not withstand such temptation, yet neither are those innocent who lay the bait in their way;

that the opinions of men are not the object of civil government, nor under its jurisdiction;

that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his own;

that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally,

that truth is great and will prevail if left to herself;

that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

Section II. We the General Assembly of Virginia do enact

that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever,

nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but

that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and

that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Section III. And though we well know that this Assembly, elected by the people for their ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.

TWO DECISIONS SEPARATING RELIGION AND GOVERNMENT

[During the earlier part of the present century, certain Sectarian forces so far succeeded in undermining the Wall of Separation between Church and State, in eluding the Guard of the separation between Religion and Government, that many public schools in numerous States were disrupted by the teaching of religion in the school room or by the releasing of pupils during school hours for religious instruction.

This breach in the Wall of Separation has now been closed by the Supreme Court of the United States through its decisions, reproduced below, in the Everson and the McCollum cases.]

Appendix

G

THE EVERSON (BUS) CASE DECISION

(330 U. S. 1—Feb. 10, 1947)

[*Wherein the invading Sectarian forces gained a minor victory and suffered a great defeat.*]

Everson v. Board of Education of the Township of Ewing, et al.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Syllabus

Pursuant to a New Jersey statute authorizing district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit, a board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolution, so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. No question was raised as to whether the exclusion of private schools operated for profit denied equal protection of the laws; nor did the record show that there were any children in the district who attended, or would have

attended but for the cost of transportation, any but public or Catholic schools. *Held:*

1. The expenditure of tax-raised funds thus authorized was for a public purpose, and did not violate the due process clause of the Fourteenth Amendment.

2. The statute and resolution did not violate the provision of the First Amendment (made applicable to the states by the Fourteenth Amendment) prohibiting any "law respecting an establishment of religion."

In a suit by a taxpayer, the New Jersey Supreme Court held that the state legislature was without power under the state constitution to authorize reimbursement to parents of bus fares paid for transporting their children to schools other than public schools. 132 N. J. L. 98, 39 A. 2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor a resolution passed pursuant to it violated the state constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350, 44 A. 2d 333. On appeal of the federal questions to this Court, *affirmed.*

Counsel for Parties.

Edward R. Burke and *E. Hilton Jackson* argued the cause for appellant. With *Mr. Burke* on the brief were *Challen B. Ellis*, *W. D. Jamieson* and *Kahl K. Spriggs*.

William H. Speer argued the cause for appellees. With him on the brief were *Porter R. Chandler* and *Roger R. Clisham*.

Briefs of *amici curiae* in support of appellant were filed by *E. Hilton Jackson* for the General Conference of Seventh-Day Adventists et al.; by *Harry V. Osborne*, *Kenneth W. Greenawalt* and *Whitney N. Seymour* for the American Civil Liberties Union; and by *Milton T. Lasher* for the State Council of the Junior Order of United American Mechanics of New Jersey.

Briefs of *amici curiae* in support of appellees were filed by *George F. Barrett*, Attorney General of Illinois, *William C. Wines*, Assistant Attorney General of Illinois, and *James A. Emmert*, Attorney General of Indiana, for the States of Illinois and Indiana; by *Fred S. LeBlanc*, Attorney General, for the State of Louisiana; by *Clarence A. Barnes*, Attorney General, for the Commonwealth of Massachusetts; by *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara*, Assistant Attorney General, for the State of Michigan; by *Nathaniel L. Goldstein*, Attorney General, and *Wendell P. Brown*, Solicitor General, for the State of New York; and by *James N. Vaughn* and *George E. Flood* for the National Council of Catholic Men et al.

Mr. Justice Black delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools.[1] The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the state constitution. 132 N. J. L. 98, 39 A. 2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350, 44 A. 2d 333. The case is here on appeal under 28 U. S. C. §344 (a).

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying State payment for their transportation, we need not consider this exclusionary language; it has no rele-

[1] "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." New Jersey Laws, 1941, c. 191, p. 581; N. J. R. S. Cum. Supp., tit. 18, c. 14, § 8.

vancy to any constitutional question here presented.[2] Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would construe its statutes as precluding payment of the school transportation of any group of pupils, even those of a private school run for profit.[3] Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. *First.* They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. *Second.* The statute and the resolution forced inhabitants to

[2] Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a "private school run for profit." Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it, and New Jersey's highest court has ruled adversely to the challenger. Striking down a state law is not a matter of such light moment that it should be done by a federal court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility. *Cf. Liverpool, N. Y. & P. S. S. Co.* v. *Comm'rs of Emigration,* 113 U. S. 33, 39.

[3] It might hold the excepting clause to be invalid, and sustain the statute with that clause excised. N. J. R. S., tit., 1, c. 1, § 10, provides with regard to any statute that if "any provision thereof, shall be declared to be unconstitutional . . . in whole or in part, by a court of competent jurisdiction, such . . . article . . . shall, to the extent that it is not unconstitutional, . . . be enforced. . . ." The opinion of the Court of Errors and Appeals in this very case suggests that state law now authorizes transportation of *all* pupils. Its opinion stated: "Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to *any* school, we conclude that such authorization of the use of local funds is likewise authorized by *Pamph. L.* 1941, *ch.* 191, and *R. S.* 18:7-78." 133 N. J. L. 350, 354, 44 A. 2d 333, 337. (Italics supplied.)

pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the state law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U. S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution. *Davidson* v. *New Orleans*, 96

U. S. 97, 103-104; *Barbier* v. *Connolly*, 113 U. S. 27, 31-32; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 157-158.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts*, 207 U. S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo*, 30 Mich, 69 (1874). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." See *Barbier* v. *Connolly*, *supra*, at 31. See also cases collected 63 A. L. R. 413; 118 A. L. R. 806. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518. Subsidies and loans to individuals such as farmers and home-owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment's prohibition against the establishment of religion by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock* v. *Pennsylvania*, 319 U. S. 105, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not

been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again,[4] therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[5]

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted

[4] See *Reynolds* v. *United States*, 98 U. S. 145, 162; *cf. Knowlton* v. *Moore*, 178 U. S. 41, 89, 106.

[5] See e. g. Macaulay, History of England (1849) I, cc. 2, 4; The Cambridge Modern History (1908) V, cc. V, IX, XI; Beard, Rise of American Civilization (1933) I, 60; Cobb, Rise of Religious Liberty in America (1902) c. II; Sweet, The Story of Religion in America (1939) c. II; Sweet, Religion in Colonial America (1942) 320–322.

by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend.[6] An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated.[7] And all of these dissenters were compelled to pay tithes and taxes [8] to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and con-

[6] See e. g. the charter of the colony of Carolina which gave the grantees the right of "patronage and advowsons of all the churches and chapels . . . together with licence and power to build and found churches, chapels and oratories . . . and to cause them to be dedicated and consecrated, according to the ecclesiastical laws of our kingdom of England." Poore, Constitutions (1878) II, 1390, 1391. That of Maryland gave to the grantee Lord Baltimore "the Patronages, and Advowsons of all Churches which . . . shall happen to be built, together with Licence and Faculty of erecting and founding Churches, Chapels, and Places of Worship . . . and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, . . . as any Bishop . . . in our Kingdom of *England*, ever . . . hath had. . . ." MacDonald, Documentary Source Book of American History (1934) 31, 33. The Commission of New Hampshire of 1680, Poore, *supra*, II, 1277, stated: "And above all things We do by these presents will, require and command our said Councill to take all possible care for ye discountenancing of vice and encouraging of virtue and good living; and that by such examples ye infidle may be invited and desire to partake of ye Christian Religion, and for ye greater ease and satisfaction of ye sd loving subjects in matters of religion, We do hereby require and command yt liberty of conscience shall be allowed unto all protestants; yt such especially as shall be conformable to ye rites of ye Church of Engd shall be particularly countenanced and encouraged." See also *Pawlet* v. *Clark*, 9 Cranch 292.

[7] See e. g. Semple, Baptists in Virginia (1894); Sweet, Religion in Colonial America, *supra* at 131-152, 322-339.

[8] Almost every colony exacted some kind of tax for church support. See e. g. Cobb, op. cit. *supra*, *note* 5, 110 (Virginia); 131 (North Carolina); 169 (Massachusetts); 270 (Connecticut); 304, 310, 339 (New York); 386 (Maryland); 295 (New Hampshire).

solidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.[9] The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation.[10] It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.[11] In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance re-

[9] Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some . . . This vexes me the worst of anything whatever. There are at this time in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." I Writings of James Madison (1900) 18, 21.

[10] Virginia's resistance to taxation for church support was crystallized in the famous "Parsons' Cause" argued by Patrick Henry in 1763. For an account see Cobb, *op. cit., supra*, note 5, 108–111.

[11] II Writings of James Madison, 183.

ceived strong support throughout Virginia,[12] and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson.[13] The preamble to that Bill stated among other things that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . ."

And the statute itself enacted

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ." [14]

This Court has previously recognized that the provision of the

[12] In a recently discovered collection of Madison's papers, Madison recollected that his Remonstrance "met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, in Fleet, *Madison's "Detached Memorandum,"* 3 William and Mary Q. (1946) 534, 551, 555.

[13] For accounts of background and evolution of the Virginia Bill for Religious Liberty see e. g. James, The Struggle for Religious Liberty in Virginia (1900); Thom, The Struggle for Religious Freedom in Virginia: The Baptists (1900); Cobb, *op. cit., supra*, note 5, 74-115; Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, op. cit., supra*, note 12, 554, 556.

[14] 12 Hening Statutes of Virginia (1823) 84; Commager, Documents of American History (1944) 125.

First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds* v. *United States*, *supra* at 164; *Watson* v. *Jones*, 13 Wall. 679; *Davis* v. *Beason*, 133 U. S. 333, 342. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.[15] Most of them did soon provide similar constitutional protections for religious liberty.[16] But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups.[17] In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect.[18] Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith.[19] The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.[20]

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress,

[15] *Permoli* v. *New Orleans*, 3 How. 589. *Cf. Barron* v. *Baltimore*, 7 Pet. 243.

[16] For a collection of state constitutional provisions on freedom of religion see Gabel, Public Funds for Church and Private Schools (1937) 148–149. See also 2 Cooley, Constitutional Limitations (1927) 960–985.

[17] Test provisions forbade officeholders to "deny . . . the truth of the Protestant religion," e. g. Constitution of North Carolina (1776) § XXXII, II Poore, *supra*, 1413. Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818, *id.*, I, 819, 820, 832.

[18] See Note 50 Yale L. J. (1941) 917; see also cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[19] See cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[20] *Ibid.* See also Cooley, *op. cit.*, *supra*, note 16.

have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.[21] The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom.[22] There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina,[23] quoted with approval by this Court in *Watson* v. *Jones*, 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds* v. *United States*, *supra* at 164.

[21] *Terrett* v. *Taylor*, 9 Cranch 43; *Watson* v. *Jones*, 13 Wall. 679; *Davis* v. *Beason*, 133 U. S. 333; *Cf. Reynolds* v. *United States*, *supra*, 162; *Reuben Quick Bear* v. *Leupp*, 210 U. S. 50.

[22] *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; *Murdock* v. *Pennsylvania*, *supra*; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Follett* v. *McCormick*, 321 U. S. 573; *Marsh* v. *Alabama*, 326 U. S. 501. *Cf. Bradfield* v. *Roberts*, 175 U. S. 291.

[23] *Harmon* v. *Dreher*, Speer's Equity Reports (S. C., 1843), 87, 120.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts*, Holmes, J., *supra* at 85, 88. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools,[24] or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children

[24] New Jersey long ago permitted public utilities to charge school children reduced rates. See *Public S. R. Co.* v. *Public Utility Comm'rs*, 81 N. J. L. 363, 80 A. 27 (1911); see also *Interstate Ry.* v. *Massachusetts*, *supra*. The District of Columbia Code requires that the new charter of the District public transportation company provide a three-cent fare "for school children . . . going to and from public, parochial, or like schools . . . ." 47 Stat. 752, 759.

going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters*, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

Mr. Justice Jackson, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other

schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

I.

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," and it draws a comparison between "state provisions intended to guarantee free transportation" for school children with services such as police and fire protection, and implies that we are here dealing with "laws authorizing new types of public services . . . ." This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself or contracting for their operation; and it is not performing any public service of any kind with this taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no

faster, and are as safe and no safer, since their parents are reimbursed as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursements to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement. The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act and resolution brought to us by this case, children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private school complaining of discrimination. It is one of a taxpayer urging that he is being taxed for an unconstitutional purpose. I think he is entitled to have us consider the Act just as it is written. The statement by the New Jersey court that it holds the Legislature may authorize use of local funds "for the transportation of pupils to any school," 133 N. J. L. 350, 354, 44 A. 2d 333, 337, in view of the other constitutional views expressed, is not a holding that this Act authorizes transportation of *all* pupils to *all* schools. As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.

If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?

II.

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured to citizens by the Constitution of the United States. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U. S. Const., Amend. I; *Cantwell* v. *Connecticut*, 310 U. S. 296.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest and that "religion is taught as part of the curriculum." But we know that such schools are parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. Under the rubric "Catholic Schools," the Canon Law of the Church, by which all Catholics are bound, provides:

"1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"

"1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine.

"The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)"

"1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to

Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)"

"1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church.

"The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.

"They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)" (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840.[1] It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic

[1] See Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.

Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

III.

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

The Court, however, compares this to other subsidies and loans to individuals and says, "Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518." Of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified

with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition, more fully expounded by Mr. Justice Rutledge, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter re-

ligious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting. See dissent in *Douglas* v. *Jeannette*, 319 U. S. 157, 166; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Jones* v. *Opelika*, 316 U. S. 584, reversed on rehearing, 319 U. S. 103.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn*, 317 U. S. 111, 131.

But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of Mr. Justice Rutledge in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

Mr. Justice Frankfurter joins in this opinion.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const., Amend. I.

"Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . .

"*We, the General Assembly, do enact*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . . ." [1]

I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.[2] New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education*, 281 U. S. 370, has opened the way by oblique ruling [3] for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

[1] "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786. See 1 Randall, The Life of Thomas Jefferson (1858) 219-220; XII Hening's Statutes of Virginia (1823) 84.

[2] *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Prince* v. *Massachusetts*, 321 U. S. 158; *Thomas* v. *Collins*, 323 U. S. 516, 530.

[3] The briefs did not raise the First Amendment issue. The only one presented was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment. See Part IV *infra*. On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the *Cochran* case the state furnished secular textbooks only. But see text *infra* at note 40 *et seq.*, and Part IV.

This case forces us to determine squarely for the first time [4] what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. The facts may be stated shortly, to give setting and color to the constitutional problem.

By statute New Jersey has authorized local boards of education to provide for the transportation of children "to and from school other than a public school" except one operated for profit wholly or in part, over established public school routes, or by other means when the child lives "remote from any school." [5] The school board of Ewing Township has provided by resolution for "the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier . . . ." [6]

Named parents have paid the cost of public conveyance of their children from their homes in Ewing to three public high schools and four parochial schools outside the district.[7] Semiannually the Board has reimbursed the parents from public school funds raised by general taxation. Religion is taught as part of the curriculum in each

[4] Cf. note 3 and text Part IV; see also note 35.

[5] The statute reads: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school . . . other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Laws of New Jersey (1941) c. 191.

[6] The full text of the resolution is given in note 59 *infra*.

[7] The public schools attended were the Trenton Senior High School, the Trenton Junior High School and the Pennington High School. Ewing Township itself provides no public high schools, affording only elementary public schools which stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic, covered in application of the resolution are St. Mary's Cathedral High School, Trenton Catholic Boys High School, and two elementary parochial schools, St. Hedwig's Parochial School and St. Francis School. The Ewing board pays only for transportation to these schools, not for tuitions. So far as the record discloses, the board does not pay for or provide transportation to any other elementary school, public or private. See notes 58, 59 and text *infra*.

of the four private schools, as appears affirmatively by the testimony of the superintendent of parochial schools in the Diocese of Trenton.

The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, 132 N. J. L. 98, 39 A. 2d 75, has held the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution. 133 N. J. L. 350, 44 A. 2d 333. We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth.

I.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." [8] Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof"

[8] IX Writings of James Madison (ed. by Hunt, 1910) 288; Padover, Jefferson (1942) 74. Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part. See note 15.

brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

No one would claim today that the Amendment is constricted, in "prohibiting the free exercise" of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security.[9] For the protective purposes of this phase of the basic freedom, street preaching, oral or by distribution of literature, has been given "the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits." [10] And on this basis parents have been held entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Accordingly, daily religious education commingled with secular is "religion" within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

"Religion" has the same broad significance in the twin prohibition concerning "an establishment." The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

[9] See *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Mormon Church* v. *United States*, 136 U. S. 1; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Prince* v. *Massachusetts*, 321 U. S. 158; also *Cleveland* v. *United States*, 329 U. S. 14.

Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom: "That it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." 1 Randall, The Life of Thomas Jefferson (1858) 220; Padover, Jefferson (1942) 81. For Madison's view to the same effect, see note 28 *infra*.

[10] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109; *Martin* v. *Struthers*, 319 U. S. 141; *Jamison* v. *Texas*, 318 U. S. 413; *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517.

II.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia,[11] of which the Amendment was the direct culmination.[12] In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. Remonstrance, Par. 15, Appendix hereto. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.[13] He

[11] Conflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording. See Cobb, Rise of Religious Liberty in America (1902); Sweet, The Story of Religion in America (1939). The Charter of Rhode Island of 1663, II Poore, Constitutions (1878) 1595, was the first colonial charter to provide for religious freedom.

The climactic period of the Virginia struggle covers the decade 1776-1786, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. For short accounts see Padover, Jefferson (1942) c. V; Brant, James Madison, The Virginia Revolutionist (1941) cc. XII, XV; James, The Struggle for Religious Liberty in Virginia (1900) cc. X, XI; Eckenrode, Separation of Church and State in Virginia (1910). These works and Randall, see note 1, will be cited in this opinion by the names of their authors. Citations to "Jefferson" refer to The Works of Thomas Jefferson (ed. by Ford, 1904-1905); to "Madison," to The Writings of James Madison (ed. by Hunt, 1901-1910).

[12] Brant, cc. XII, XV; James, cc. X, XI; Eckenrode.

[13] See Brant, c. XII, particularly at 243. Cf. Madison's Remonstrance, Appendix to this opinion. Jefferson of course held the same view. See note 15. "Madison looked upon . . . religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." Brant, 243; and see Remonstrance, Par. 1, 4, 15, Appendix.

sought also to have the Declaration expressly condemn the existing Virginia establishment.[14] But the forces supporting it were then too strong.

Accordingly Madison yielded on this phase but not for long. At once he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779 he threw his full weight behind Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code.[15] With Jefferson's departure for Europe in 1784, Madison became the Bill's prime sponsor.[16] Enactment failed in successive legislatures from its introduction in June, 1779, until its adoption in January, 1786. But during all this time the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784.

The climax came in the legislative struggle of 1784-1785 over the Assessment Bill. See Supplemental Appendix, hereto. This was noth-

[14] See Brant, 245-246. Madison quoted liberally from the Declaration in his Remonstrance and the use made of the quotations indicates that he considered the Declaration to have outlawed the prevailing establishment in principle, if not technically.

[15] Jefferson was chairman of the revising committee and chief draftsman. Corevisers were Wythe, Pendleton, Mason and Lee. The first enacted portion of the revision, which became known as Jefferson's Code, was the statute barring entailments. Primogeniture soon followed. Much longer the author was to wait for enactment of the Bill for Religious Freedom; and not until after his death was the corollary bill to be accepted in principle which he considered most important of all, namely, to provide for common education at public expense. See V Jefferson, 153. However, he linked this with disestablishment as corollary prime parts in a system of basic freedoms. I Jefferson, 78.

Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies . . . and that therefore to declare this act irrevocable would be no effect in law," the Bill's concluding provision as enacted nevertheless asserted: "Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural rights." 1 Randall, 220.

[16] See I Jefferson, 70-71; XII Jefferson, 447; Padover, 80.

ing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition.[17] As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses.[18] But what is of the utmost significance here, "in its final form the bill left the taxpayer the option of giving his tax to education." [19]

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed. The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the Assembly reconvened in the fall he issued his historic Memorial and Remonstrance.[20]

This is Madison's complete, though not his only, interpretation of religious liberty.[21] It is a broadside attack upon all forms of "estab-

[17] Madison regarded this action as desertion. See his letter to Monroe of April 12, 1785; II Madison, 129, 131-132; James, cc. X, XI. But see Eckenrode, 91, suggesting it was surrender to the inevitable.

The bill provided: "That for every sum so paid, The Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid . . . ." See also notes 19, 43 *infra*.

A copy of the Assessment Bill is to be found among the Washington manuscripts in the Library of Congress. Papers of George Washington, Vol. 231. Because of its crucial role in the Virginia struggle and bearing upon the First Amendment's meaning, the text of the Bill is set forth in the Supplemental Appendix to this opinion.

[18] Eckenrode, 99, 100.

[19] *Id.*, 100; II Madison, 113. The bill directed the sheriff to pay "all sums which . . . may not be appropriated by the person paying the same . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." Supplemental Appendix.

[20] See generally Eckenrode, c. V; Brant, James, and other authorities cited in note 11 above.

[21] II Madison, 183; and the Appendix to this opinion. Eckenrode, 100 ff. See also Fleet, Madison's "Detached Memoranda" (1946) III William & Mary Q. (3d Series) 534, 554-562.

lishment" of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes, the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." Because it behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise, the text of the Remonstrance is appended at the end of this opinion for its wider current reference, together with a copy of the bill against which it was directed.

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill.[22] It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill for Establishing Religious Freedom. Madison promptly drove it through in January of 1786, seven years from the time it was first introduced. This dual victory substantially ended the fight over establishments, settling the issue against them. See note 33.

The next year Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia as elsewhere, and nowhere else more effectively.[23] Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" [24] and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it . . . ." [25] Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty

[22] The major causes assigned for its defeat include the elevation of Patrick Henry to the governorship in November of 1784; the blunder of the proponents in allowing the Bill for Incorporations to come to the floor and incur defeat before the Assessment Bill was acted on; Madison's astute leadership, taking advantage of every "break" to convert his initial minority into a majority, including the deferment of action on the third reading to the fall; the Remonstrance, bringing a flood of protesting petitions; and the general poverty of the time. See Eckenrode, c. V, for an excellent short, detailed account.

[23] See James, Brant, *op. cit. supra* note 11.

[24] V Madison, 176. Cf. notes 33, 37.

[25] V Madison, 132.

of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.[26]

Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights.[27]

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support.[28] Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. The Remonstrance, following the Virginia statute's

[26] Brant, 250. The assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution. See James, 154-158.

[27] The amendment with respect to religious liberties read, as Madison introduced it: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Congress 434. In the process of debate this was modified to its present form. See especially 1 Annals of Congress 729-731, 765; also note 34.

[28] See text of the Remonstrance, Appendix; also notes 13, 15, 24, 25 *supra* and text.

Madison's one exception concerning restraint was for "preserving public order." Thus he declared in a private letter, IX Madison, 484, 487, written after the First Amendment was adopted: "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinance of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others." Cf. note 9.

example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.

In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose. Remonstrance, Par. 3.[29] Tithes had been the lifeblood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. "If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies." [30] Not the amount but "the principle of assessment was wrong." And the principle was as much to prevent "the interference of law in religion" as to restrain religious intervention in political matters.[31] In this field the authors of our freedom would not tolerate "the first experiment on our liberties" or "wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." Remonstrance, Par. 3. Nor should we.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called

[29] The third ground of remonstrance, see the Appendix, bears repetition for emphasis here: "Because, it is proper to take alarm at the first experiment on our liberties . . . The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that . . . the same authority which can force a citizen to *contribute three pence* only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Emphasis added.) II Madison 183, 185-186.

[30] Eckenrode, 105, in summary of the Remonstrance.

[31] "Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation." Remonstrance, Appendix, Par. 5; II Madison 183, 187.

for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly,[32] supply it.

By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled.[33] Indeed the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only enlightening reference shows concern, not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording.[34] In

[32] As is pointed out above, note 3, and in Part IV *infra*, *Cochran* v. *Board of Education*, 281 U. S. 370, was not such a case.

[33] See text *supra* at notes 24, 25. Madison, of course, was but one of many holding such views, but nevertheless agreeing to the common understanding for adoption of a Bill of Rights in order to remove all doubt engendered by the absence of explicit guaranties in the original Constitution.

By 1791 the great fight over establishments had ended, although some vestiges remained then and later, even in Virginia. The glebes, for example, were not sold there until 1802. Cf. Eckenrode, 147. Fixing an exact date for "disestablishment" is almost impossible, since the process was piecemeal. Although Madison failed in having the Virginia Bill of Rights declare explicitly against establishment in 1776, cf. note 14 and text *supra*, in 1777 the levy for support of the Anglican clergy was suspended. It was never resumed. Eckenrode states: "This act, in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777, when the act suspending the payment of tithes became effective. This was not seen at the time. . . . But in freeing almost half of the taxpayers from the burden of the state religion, the state religion was at an end. Nobody could be forced to support it, and an attempt to levy tithes upon Anglicans alone would be to recruit the ranks of dissent." P. 53. See also pp. 61, 64. The question of assessment however was revived "with far more strength than ever, in the summer of 1784." *Id.*, 64. It would seem more factual therefore to fix the time of disestablishment as of December, 1785-January, 1786, when the issue in large was finally settled.

[34] At one point the wording was proposed: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Congress 729. Cf. note 27. Representative Huntington of Connecticut feared this might be construed to prevent judicial enforcement of private pledges. He stated "that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any

the margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.[35]

III.

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies.[36] Test oaths and religious qualification for office followed later.[37] These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is

of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment." 1 Annals of Congress 730.

To avoid any possibility, Madison suggested inserting the word "national" before "religion," thereby not only again disclaiming intent to bring about the result Huntington feared but also showing unmistakably that "establishment" meant public "support" of religion in the financial sense. Annals of Congress 731. See also IX Madison, 484-487.

[35] The decision most closely touching the question, where it was squarely raised, is *Quick Bear* v. *Leupp*, 210 U. S. 50. The Court distinguished sharply between appropriations from public funds for the support of religious education and appropriations from funds held in trust by the Government essentially as trustee for private individuals, Indian wards, as beneficial owners. The ruling was that the latter could be disbursed to private, religious schools at the designation of those patrons for paying the cost of their education. But it was stated also that such a use of public moneys would violate both the First Amendment and the specific statutory declaration involved, namely, that "it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." 210 U. S. at 79. Cf. *Ponce* v. *Roman Catholic Apostolic Church*, 210 U. S. 296, 322. And see *Bradfield* v. *Roberts*, 175 U. S. 291, an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital. Cf. also the authorities cited in note 9.

[36] See text at note 1.

[37] ". . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Const., Art. VI, § 3. See also the two forms prescribed for the President's Oath or Affirmation. Const., Art. II, § 1. Cf. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *United States* v. *Lovett*, 328 U. S. 303.

through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.[38] Today as then the furnishing of "contributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic

[38] In the words of the Virginia statute, following the portion of the preamble quoted at the beginning of this opinion: ". . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind . . . ." Cf. notes 29, 30, 31 and text *supra*.

instruction. Each thus contributes to "the propagation of opinions which he disbelieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies "the comfortable liberty" of giving one's contribution to the particular agency of instruction he approves.[39]

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Indeed the view is sincerely avowed by many of various faiths,[40] that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Certainly for purposes of constitutionality we cannot contradict the whole basis of the ethical and educational convictions of people who believe in religious schooling.

[39] See note 38.

[40] See Bower, Church and State in Education (1944) 58: ". . . the fundamental division of the education of the whole self into the secular and the religious could not be justified on the grounds of either a sound educational philosophy or a modern functional concept of the relation of religion to personal and social experience." See also Vere, The Elementary School, in Essays on Catholic Education in the United States (1942) 110-111; Gabel, Public Funds for Church and Private Schools (1937) 737-739.

Yet this very admixture is what was disestablished when the First Amendment forbade "an establishment of religion." Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis or make them of minor part, if proportion were material. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular.

An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See *Judd* v. *Board of Education*, 278 N. Y. 200, 212, 15 N. E. 2d 576, 582. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of

beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Thomas* v. *Collins*, 323 U. S. 516.[41] Now, as in Madison's time, not the amount but the principle of assessment is wrong. Remonstrance, Par. 3.

IV.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.

If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature's decision that the payment of public

[41] It would seem a strange ruling that a "reasonable," that is, presumably a small, license fee cannot be placed upon the exercise of the right of religious instruction, yet that under the correlative constitutional guaranty against "an establishment" taxes may be levied and used to aid and promote religious instruction, if only the amounts so used are small. See notes 30-31 *supra* and text.

Madison's objection to "three pence" contributions and his stress upon "denying the principle" without waiting until "usurped power had . . . entangled the question in precedents," note 29, were reinforced by his further characterization of the Assessment Bill: "Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance." Remonstrance, Par. 9; II Madison 183, 188.

moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction. There could not be, on that basis, valid constitutional objection.[42]

Of course paying the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all other items of educational expense. And obviously, as the majority say, it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose. Our nation-wide system of public education rests on the contrary view, as do all grants in aid of education, public or private, which is not religious in character.

These things are beside the real question. They have no possible materiality except to obscure the all-pervading, inescapable issue. *Cf. Cochran* v. *Board of Education*, *supra*. Stripped of its religious phase, the case presents no substantial federal question. *Ibid.* The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case. So of course do the "public welfare" and "social legislation" ideas, for they come to the same thing.

We have here then one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.

[42] If it is part of the state's function to supply to religious schools or their patrons the smaller items of educational expense, because the legislature may say they perform a public function, it is hard to see why the larger ones also may not be paid. Indeed, it would seem even more proper and necessary for the state to do this. For if one class of expenditures is justified on the ground that it supports the general cause of education or benefits the individual, or can be made to do so by legislative declaration, so even more certainly would be the other. To sustain payment for transportation to school, for textbooks, for other essential materials, or perhaps for school lunches, and not for what makes all these things effective for their intended end, would be to make a public function of the smaller items and their cumulative effect, but to make wholly private in character the larger things without which the smaller could have no meaning or use.

This is precisely for the reason that education which includes religious training and teaching, and its support, have been made matters of private right and function, not public, by the very terms of the First Amendment. That is the effect not only in its guaranty of religion's free exercise, but also in the prohibition of establishments. It was on this basis of the private character of the function of religious education that this Court held parents entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters, supra.* Now it declares in effect that the appropriation of public funds to defray part of the cost of attending those schools is for a public purpose. If so, I do not understand why the state cannot go farther or why this case approaches the verge of its power.

In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The "public function"—"public welfare"—"social legislation" argument seeks, in Madison's words, to "employ Religion [that is, here, religious education] as an engine of Civil policy." Remonstrance, Par. 5. It is of one piece with the Assessment Bill's preamble, although with the vital difference that it wholly ignores what that preamble explicitly states.[43]

Our constitutional policy is exactly the opposite. It does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

[43] "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies of communities of Christians; . . . ." Supplemental Appendix; Foote, Sketches of Virginia (1850) 340.

It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction. In failure to observe it lies the fallacy of the "public function"— "social legislation" argument, a fallacy facilitated by easy transference of the argument's basing from due process unrelated to any religious aspect to the First Amendment.

By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which in fact give aid to or promote religious uses. Cf. *Norris* v. *Alabama*, 294 U. S. 587, 590; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Akins* v. *Texas*, 325 U. S. 398, 402. Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The Amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8.[44] The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8.[45]

[44] "Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world . . . . Because the establishment in question is not necessary for the support of Civil Government. . . . What influence in fact have ecclesiastical establishments had on Civil Society? . . . in no instance have they been seen the guardians of the liberties of the people." II Madison 183, 187, 188.

[45] "Because experience witnesseth that ecclesiastical establishments, instead

Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11.[46]

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds.[47] The issue and the dissension work typically, in Madison's phrase, to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Id.*, Par. 11. This occurs, as he well knew, over measures at the very threshhold of departure from the principle. *Id.*, Par. 3, 9, 11.

In these conflicts wherever success has been obtained it has been upon the contention that by providing the transportation the general

of maintaining the purity and efficacy of Religion, have had a contrary operation." II Madison 183, 187.

[46] "At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased." II Madison 183, 189.

[47] In this case briefs *amici curiae* have been filed on behalf of various organizations representing three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York. All these states have laws similar to New Jersey's and all of them, with one religious sect, support the constitutionality of New Jersey's action. The others oppose it. Maryland and Mississippi have sustained similar legislation. Note 49 *infra*. No state without legislation of this sort has filed an opposing brief. But at least six states have held such action invalid, namely, Delaware, Oklahoma, New York, South Dakota, Washington and Wisconsin. Note 49 *infra*. The New York ruling was overturned by amendment to the state constitution in 1938. Constitution of New York, Art. XI, 4.

Furthermore, in this case the New Jersey courts divided, the Supreme Court holding the statute and resolution invalid, 132 N. J. L. 98, 39 A. 2d 75, the Court of Errors and Appeals reversing that decision, 133 N. J. L. 350, 44 A. 2d 333. In both courts, as here, the judges split, one of three dissenting in the Supreme Court, three of nine in the Court of Errors and Appeals. The division is typical. See the cases cited in note 49.

cause of education, the general welfare, and the welfare of the individual will be forwarded; hence that the matter lies within the realm of public function, for legislative determination.[48] State courts have divided upon the issue, some taking the view that only the individual, others that the institution receives the benefit.[49] A few have recognized that this dichotomy is false, that both in fact are aided.[50]

The majority here does not accept in terms any of those views. But neither does it deny that the individual or the school, or indeed both, are benefited directly and substantially.[51] To do so would cut the ground from under the public function—social legislation thesis. On the contrary, the opinion concedes that the children are aided by being helped to get to the religious schooling. By converse necessary implication as well as by the absence of express denial, it must be

[48] See the authorities cited in note 49; and see note 54.

[49] Some state courts have sustained statutes granting free transportation or free school books to children attending denominational schools on the theory that the aid was a benefit to the child rather than to the school. See *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. 2d 930, with which compare *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. 2d 963; *Cochran* v. *Board of Education*, 168 La. 1030, 123 So. 664, aff'd, 281 U. S. 370; *Borden* v. *Board of Education*, 168 La. 1005, 123 So. 655; *Board of Education* v. *Wheat*, 174 Md. 314, 199 A. 628; *Adams* v. *St. Mary's County*, 180 Md. 550, 26 A. 2d 377; *Chance* v. *State Textbook R. & P. Board*, 190 Miss. 453, 200 So. 706. See also *Bowker* v. *Baker*, 73 Cal. App. 2d 653, 167 P. 2d 256. Other courts have held such statutes unconstitutional under state constitutions as aid to the schools. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576, but see note 47 *supra*; *Smith* v. *Donahue*, 202 App. Div. 656, 195 N. Y. S. 715; *State ex rel. Traub* v. *Brown*, 36 Del. 181, 172 A. 835; *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. 2d 1002; *Mitchell* v. *Consolidated School District*, 17 Wash. 2d 61, 135 P. 2d 79; *Van Straten* v. *Milquet*, 180 Wis. 109, 192 N. W. 392. And cf. *Hlebanja* v. *Brewe*, 58 S. D. 351, 236 N. W. 296. And since many state constitutions have provisions forbidding the appropriation of public funds for private purposes, in these and other cases the issue whether the statute was for a "public" or "private" purpose has been present. See Note (1941) 50 Yale L. J. 917, 925.

[50] *E. g.*, *Gurney* v. *Ferguson*, 190 Okla. 254, 255, 122 P. 2d 1002, 1003; *Mitchell* v. *Consolidated School District*, 17 Wash. 2d 61, 68, 135 P. 2d 79, 82; *Smith* v. *Donahue*, 202 App. Div. 656, 664, 195 N. Y. S. 715, 722; *Board of Education* v. *Wheat*, 174 Md. 314, discussing opinion at 340, 199 A. 628 at 639. This is true whether the appropriation and payment are in form to the individual or to the institution. *Ibid.* Questions of this gravity turn upon the purpose and effect of the state's expenditure to accomplish the forbidden object, not upon who receives the amount and applies it to that end or the form and manner of the payment.

[51] The payments here averaged roughly $40.00 a year per child.

taken to concede also that the school is helped to reach the child with its religious teaching. The religious enterprise is common to both, as is the interest in having transportation for its religious purposes provided.

Notwithstanding the recognition that this two-way aid is given and the absence of any denial that religious teaching is thus furthered, the Court concludes that the aid so given is not "support" of religion. It is rather only support of education as such, without reference to its religious content, and thus becomes public welfare legislation. To this elision of the religious element from the case is added gloss in two respects, one that the aid extended partakes of the nature of a safety measure, the other that failure to provide it would make the state unneutral in religious matters, discriminating against or hampering such children concerning public benefits all others receive.

As will be noted, the one gloss is contradicted by the facts of record and the other is of whole cloth with the "public function" argument's excision of the religious factor.[52] But most important is that this approach, if valid, supplies a ready method for nullifying the Amendment's guaranty, not only for this case and others involving small grants in aid for religious education, but equally for larger ones. The only thing needed will be for the Court again to transplant the "public welfare—public function" view from its proper nonreligious due process bearing to First Amendment application, holding that religious education is not "supported" though it may be aided by the appropriation, and that the cause of education generally is furthered by helping the pupil to secure that type of training.

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. *Id.*, Par. 9.[53] Today as in his time "the same authority which can force a citizen to contribute three pence only . . . for the support of any one [religious] establishment, may force him" to pay more; or "to conform to any other establishment in all cases whatsoever." And now, as then, "either . . . we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." Remonstrance, Par. 15.

[52] See Part V.

[53] See also note 46 *supra* and Remonstrance, Par. 3.

The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual man and his God. It should be kept inviolately private, not "entangled . . . in precedents" [54] or confounded with what legislatures legitimately may take over into the public domain.

V.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very

[54] Thus each brief filed here by the supporters of New Jersey's action, see note 47, not only relies strongly on *Cochran* v. *Board of Education*, 281 U. S. 370, but either explicitly or in effect maintains that it is controlling in the present case.

existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. Remonstrance, Par. 8, 12.

That policy necessarily entails hardship upon persons who forego the right to educational advantages the state can supply in order to secure others it is precluded from giving. Indeed this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.

The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of whatever faith,[55] yet in the light of our tradition it could not stand. For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation.

[55] See text at notes 17-19 *supra* and authorities cited; also Foote, Sketches of Virginia (1850) c. XV. Madison's entire thesis, as reflected throughout the Remonstrance and in his other writings, as well as in his opposition to the final form of the Assessment Bill, see note 43, was altogether incompatible with acceptance of general and "nondiscriminatory" support. See Brant, c. XII.

VI.

Short treatment will dispose of what remains. Whatever might be said of some other application of New Jersey's statute, the one made here has no semblance of bearing as a safety measure or, indeed, for securing expeditious conveyance. The transportation supplied is by public conveyance, subject to all the hazards and delays of the highway and the streets incurred by the public generally in going about its multifarious business.

Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety.[56] Certainly the fire department must not stand idly by while the church burns. Nor is this reason why the state should pay the expense of transportation or other items of the cost of religious education.[57]

Needless to add, we have no such case as *Green* v. *Frazier*, 253 U. S. 233, or *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, which dealt with matters wholly unrelated to the First Amendment, involving only situations where the "public function" issue was determinative.

I have chosen to place my dissent upon the broad ground I think

[56] The protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses. The First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life. It forbids support, not protection from interference or destruction.

It is a matter not frequently recalled that President Grant opposed tax exemption of religious property as leading to a violation of the principle of separation of church and state. See President Grant's Seventh Annual Message to Congress, December 7, 1875, in IX Messages and Papers of the Presidents (1897) 4288-4289. Garfield, in a letter accepting the nomination for the presidency, said: ". . . it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute." II The Works of James Abram Garfield (ed. by Hinsdale, 1883) 783.

[57] Neither do we have here a case of rate-making by which a public utility extends reduced fares to all school children, including patrons of religious schools. Whether or not legislative compulsion upon a private utility to extend such an advantage would be valid, or its extension by a municipally owned system, we are not required to consider. In the former instance, at any rate, and generally if not always in the latter, the vice of using the taxing power to raise funds for the support of religion would not be present.

decisive, though strictly speaking the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of children who attend private, profit-making schools.[58] I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.[59] There is no showing that there are no other private or religious schools in this populous district.[60] I do not think it can be assumed there were none.[61] But in the view I have taken, it is unnecessary to limit grounding to these matters.

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public

[58] It would seem at least a doubtfully sufficient basis for reasonable classification that some children should be excluded simply because the only school feasible for them to attend, in view of geographic or other situation, might be one conducted in whole or *in part* for profit. Cf. note 5.

[59] See note 7 *supra*. The resolution was as follows, according to the school board's minutes read in proof: "The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools *and Catholic Schools* by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted." (Emphasis added.) The New Jersey court's holding that the resolution was within the authority conferred by the state statute is binding on us. *Reinman* v. *Little Rock*, 237 U. S. 171, 176; *Hadacheck* v. *Sebastian*, 239 U. S. 394, 414.

[60] The population of Ewing Township, located near the City of Trenton, was 10,146 according to the census of 1940. Sixteenth Census of the United States, Population, Vol. 1, 674.

[61] In *Thomas* v. *Collins*, 323 U. S. 516, 530, it was said that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." Cf. Remonstrance, Par. 3, 9. And in other cases it has been held that the usual presumption of constitutionality will not work to save such legislative excursions in this field. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4; see Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 795 *et seq.*

Apart from the Court's admission that New Jersey's present action approaches the verge of her power, it would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages.

funds for the aid and support of various private religious schools. See Johnson, The Legal Status of Church-State Relationships in the United States (1934); Thayer, Religion in Public Education (1947); Note (1941) 50 Yale L. J. 917. In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

Appendix

H

THE McCOLLUM (RELIGIOUS INSTRUCTION) CASE DECISION

(333 U. S. 203—March 8, 1948)

[*Wherein the Separationist forces won a complete victory*]

Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

Syllabus.

With the permission of a board of education, granted under its general supervisory powers over the use of public school buildings, religious teachers employed, subject to the approval and supervision of the superintendent of schools, by a private religious group including representatives of the Catholic, Protestant and Jewish faiths, gave religious instruction in public school buildings once each week. Pupils whose parents so requested were excused from their secular classes during the periods of religious instruction and were required to attend the religious classes; but other pupils were not released from their public school duties, which were compulsory under state law. A resident and taxpayer of the school district whose child was enrolled in the public schools sued in a state court for a writ of mandamus requiring the board of education to terminate this practice. *Held:*

1. A judgment of the State Supreme Court sustaining denial of the writ of mandamus on the ground that the state statutes granted the board of education authority to establish such a program drew into question "the validity of a statute" of the State within the meaning of § 237 of the Judicial Code, and was appealable to this Court.

2. As a resident and taxpayer of the school district and the parent of a child required by state law to attend the school, appellant had a standing to maintain the suit.

3. Both state courts having ruled expressly an appellant's claim that the state program violated the Federal Constitution, a motion to dismiss the

appeal on the ground that appellant failed properly to present that question in the State Supreme Court cannot be sustained.

4. This utilization of the State's tax-supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings violates the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment.

The Supreme Court of Illinois affirmed a denial of a petition for a writ of mandamus requiring a board of education to terminate the giving of religious instruction by private teachers in the public schools. 396 Ill. 14, 71 N. E. 2d 161. On appeal to this Court, *reversed and remanded*, p. 212.

Counsel for Parties.

Walter F. Dodd and *Edward R. Burke* argued the cause for appellant. *Mr. Dodd* also filed a brief.

John L. Franklin and *Owen Rall* argued the cause and filed a brief for appellees.

Briefs of *amici curiae* urging reversal were filed by *Henry Epstein, Leo Pfeffer* and *Samuel Rothstein* for the Synagogue Council of America et al.; *Herbert A. Wolff* for the American Ethical Union; *E. Hilton Jackson, Challen B. Ellis, W. D. Jamieson* and *Kahl K. Spriggs* for the Joint Conference Committee on Public Relations of several Baptist conventions; *Edward C. Park* for the American Unitarian Association; *Kenneth W. Greenawalt, Leon Despres, Russell Whitman, John D. Miller, William L. Marbury, Thomas H. Eliot, Winthrop Wadleigh, Whitney N. Seymour* and *Gurney Edwards* for the American Civil Liberties Union; and *Homer Cummings* and *William D. Donnelly* for the General Conference of Seventh Day Adventists.

George F. Barrett, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, filed a brief as *amici curiae*, urging affirmance.

Charles H. Tuttle filed a brief for the Protestant Council of New York City, as *amicus curiae*.

Mr. Justice Black delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum, began this action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the

hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given general supervisory powers over the use of the public school buildings within the school districts. Ill. Rev. Stat. ch. 122, § § 123, 301 (1943).

Appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools in Champaign School District Number 71, . . . and in all public school houses and buildings in said district when occupied by public schools."

The board first moved to dismiss the petition on the ground that under Illinois law appellant had no standing to maintain the action. This motion was denied. An answer was then filed, which admitted that regular weekly religious instruction was given during school hours to those pupils whose parents consented and that those pupils were released temporarily from their regular secular classes for the limited purpose of attending the religious classes. The answer denied that this coordinated program of religious instruction violated the State or Federal Constitution. Much evidence was heard, findings of fact were made, after which the petition for mandamus was denied on the ground that the school's religious instruction program violated neither the federal nor state constitutional provisions invoked by the appellant. On appeal the State Supreme Court affirmed. 396 Ill. 14, 71 N. E. 2d 161. Appellant appealed to this Court under 28 U. S. C. § 344 (a), and we noted probable jurisdiction on June 2, 1947.

The appellees press a motion to dismiss the appeal on several grounds, the first of which is that the judgment of the State Supreme Court does not draw in question the "validity of a statute of any State" as required by 28 U. S. C. § 344 (a). This contention rests

on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute. But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 U. S. C. § 344 (a). *Hamilton* v. *Regents of U. of Cal.*, 293 U. S. 245, 258. A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. *Coleman* v. *Miller*, 307 U. S. 433, 443, 464. A third ground for the motion is that the appellant failed properly to present in the State Supreme Court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts on this question, the argument cannot be successfully maintained. The motion to dismiss the appeal is denied.

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute.[1] In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; [2] they were held weekly, thirty minutes for the lower grades,

[1] Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: (1) In actual practice certain Protestant groups have obtained an overshadowing advantage in the propagation of their faiths over other Protestant sects; (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it; and (3) the power given the school superintendent to reject teachers selected by religious groups and the power given the local Council on Religious Education to determine which religious faiths should participate in the program was a prior censorship of religion.

In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

[2] The Supreme Court described the request card system as follows: ". . . Admission to the classes was to be allowed only upon the express

forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools.[3] The classes were taught in three separate religious groups by Protestant teachers,[4] Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to

written request of parents, and then only to classes designated by the parents. . . . Cards were distributed to the parents of elementary students by the public-school teachers requesting them to indicate whether they desired their children to receive religious education. After being filled out, the cards were returned to the teachers of religious education classes either by the public-school teachers or the children. . . ." On this subject the trial court found that ". . . those students who have obtained the written consent of their parents therefor are released by the school authorities from their secular work, and in the grade schools for a period of thirty minutes' instruction in each week during said school hours, and forty-five minutes during each week in the junior high school, receive training in religious education. . . . Certain cards are used for obtaining permission of parents for their children to take said religious instruction courses, and they are made available through the offices of the superintendent of schools and through the hands of principals and teachers to the pupils of the school district. Said cards are prepared at the cost of the council of religious education. The handling and distribution of said cards does not interfere with the duties or suspend the regular secular work of the employees of the defendant. . . ."

[3] The State Supreme Court said: "The record further discloses that the teachers conducting the religious classes were not teachers in the public schools but were subject to the approval and supervision of the superintendent. . . ." The trial court found: "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." The president of the local school board testified: ". . . The Protestants would have one group and the Catholics, and would be given a room where they would have the class and we would go along with the plan of the religious people. They were all to be treated alike, with the understanding that the teachers they would bring into the school were approved by the superintendent. . . . The superintendent was the last word so far as the individual was concerned. . . ."

[4] There were two teachers of the Protestant faith. One was a Presbyterian and had been a foreign missionary for that church. The second testified as follows: "I am affiliated with the Christian church. I also work in the Methodist Church and I taught at the Presbyterian. I am married to a Lutheran."

take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.[5]

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education*, 330 U. S. 1. There we said: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[6] Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a

[5] The director of the Champaign Council on Religious Education testified: ". . . If any pupil is absent we turn in a slip just like any teacher would to the superintendent's office. The slip is a piece of paper with a number of hours in the school day and a square, and the teacher of the particular room for the particular hour records the absentees. It has their names and the grade and the section to which they belong. It is the same sheet that the geography and history teachers and all the other teachers use, and is furnished by the school. . . ."

[6] The dissent, agreed to by four judges, said: "The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. . . . Again, it was the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation." *Everson* v. *Board of Education*, 330 U. S. 1, 59, 60.

belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[7] Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " *Id.* at 15-16. The majority in the *Everson* case, and the minority as shown by quotations from the dissenting views in our notes 6 and 7, agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to

[7] The dissenting judges said: "In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . . . Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." *Everson* v. *Board of Education*, 330 U. S. 1, 41, 52-53.

religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Frankfurter delivered the following opinion, in which Mr. Justice Jackson, Mr Justice Rutledge and Mr. Justice Burton join.*

We dissented in *Everson* v. *Board of Education*, 330 U. S. 1, because in our view the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority. Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this.

This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." But agreement, in the abstract, that the First Amendment was designed to erect a "wall of separation between church and State," does not preclude a clash of views as to what the wall separates. In-

* Mr. Justice Rutledge and Mr. Justice Burton concurred also in the Court's opinion.

volved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before us.

To understand the particular program now before us as a conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution and with due regard to the kind of society for which it was designed, we must put this Champaign program of 1940 in its historic setting. Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.

The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of "one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures." The Laws and Liberties of Massachusetts, 1648 edition (Cambridge 1929) 47.[1]

The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. It is appropriate to recall that the Remonstrance

[1] For an exposition of the religious origins of American education, see S. W. Brown, The Secularization of American Education (1912) cc. I, II; Knight, Education in the United States (2d rev. ed. 1941) cc. III, V; Cubberley, Public Education in the United States (1934) cc. II, III.

of James Madison, an event basic in the history of religious liberty, was called for by a proposal which involved support to religious education. See Mr. Justice Rutledge's opinion in the *Everson* case, *supra*, 330 U. S. at 36-37. As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various form in other States. New York and Massachusetts provide famous chapters in the history that established dissociation of religious teaching from State-maintained schools. In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught.[2] In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict.[3] The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. In sustaining Stephen Girard's will, this Court referred to the inevitable conflicts engendered by matters "connected with religious polity" and particularly "in a country composed of such a variety of religious sects as our country." *Vidal* v. *Girard's Executors*, 2 How. 127, 198. That was more than one hundred years ago.

Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was

[2] See Boese, Public Education in the City of New York (1869) c. XIV; Hall, Religious Education in the Public Schools of the State and City of New York (1914) cc. VI, VII; Palmer, The New York Public School (1905) cc. VI, VII, X, XII. And see New York Laws 1842, c. 150, § 14, amended, New York Laws 1844, c. 320, § 12.

[3] S. M. Smith, The Relation of the State to Religious Education in Massachusetts (1926) c. VII; Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929).

the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.[4] A totally different situation elsewhere, as illustrated for instance by the English provisions for religious education in State-maintained schools, only serves to illustrate that free societies are not cast in one mould. See the Education Act of 1944, 7 and 8 Geo. VI, c. 31. Different institutions evolve from different historic circumstances.

It is pertinent to remind that the establishment of this principle of separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent

[4] It has been suggested that secular education in this country is the inevitable "product of 'the utter impossibility of harmonizing multiform creeds.' " T. W. M. Marshall, *Secular Education in England and the United States*, 1 American Catholic Quarterly Review 278, 308. It is precisely because of this "utter impossibility" that the fathers put into the Constitution the principle of complete "hands-off," for a people as religiously heterogeneous as ours.

conflict.[5] While in small communities of comparatively homogeneous religious beliefs, the need for absolute separation presented no urgencies, elsewhere the growth of the secular school encountered the resistance of feeling strongly engaged against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.

Enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:

> "Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good commonschool education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." "The President's Speech at Des Moines," 22 *Catholic World* 433, 434-435 (1876).

So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition

[5] See Cubberley, Public Education in the United States (1934) pp. 230 *et seq.*; Zollmann, *The Relation of Church and State*, in Lotz and Crawford, Studies in Religious Education (1931) 403, 418 *et seq.*; Payson Smith, *The Public Schools and Religious Education*, in Religion and Education (Sperry, Editor, 1945) pp. 32 *et seq.*; also Mahoney, The Relation of the State to Religious Education in Early New York 1633-1825 (1941) c. VI; McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870-1945 (1946) c. I; and see note 10, *infra*.

against the use of public funds for sectarian education,[6] such as had been written into many State constitutions.[7] By 1894, in urging the adoption of such a provision in the New York Constitution, Elihu Root was able to summarize a century of the nation's history: "It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State." Root, Addresses on Government and Citizenship, 137, 140.[8] The extent to which this principle

[6] President Grant's Annual Message to Congress, December 7, 1875, 4 Cong. Rec. 175 *et seq.*; Ames, The Proposed Amendments to the Constitution of the United States during the First Century of its History, H. R. Doc. No. 353, Pt. 2, 54th Cong., 2d Sess., pp. 277-78. In addition to the first proposal, "The Blaine Amendment," five others to similar effect are cited by Ames. The reason for the failure of these attempts seems to have been in part that the "provisions of the State constitutions are in almost all instances adequate on this subject, and no amendment is likely to be secured." *Id.*

In the form in which it passed the House of Representatives, the Blaine Amendment read as follows: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. . . ." H. Res 1, 44th Cong., 1st Sess. (1876).

[7] See *Constitutions of the States and United States*, III Report of the New York State Constitutional Convention Committee (1938) Index. pp. 1766-67.

[8] It is worthy of interest that another famous American lawyer, and indeed one of the most distinguished of American judges, Jeremiah S. Black, expressed similar views nearly forty years before Mr. Root: "The manifest object of the men who framed the institutions of this country, was to have a *State without religion*, and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other . . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. For that reason

was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control." [9]

Prohibition of the commingling of sectarian and secular instruction in the public school is of course only half the story. A religious people was naturally concerned about the part of the child's education entrusted "to the family altar, the church, and the private school." The promotion of religious education took many forms. Laboring under financial difficulties and exercising only persuasive authority, various denominations felt handicapped in their task of religious education. Abortive attempts were therefore frequently made to obtain public funds for religious schools.[10] But the major efforts of

they built up a wall of complete and perfect partition between the two." From *Religious Liberty* (1856) in Black, Essays and Speeches (1886) 51, 53; cf. Brigance, Jeremiah Sullivan Black (1934). While Jeremiah S. Black and Elihu Root had many things in common, there were also important differences between them, perhaps best illustrated by the fact that one became Secretary of State to President Buchanan, the other to Theodore Roosevelt. That two men, with such different political alignment, should have shared identic views on a matter so basic to the well-being of our American democracy affords striking proof of the respect to be accorded to that principle.

[9] 25 Stat. 676, 677, applicable to North Dakota, South Dakota, Montana and Washington, required that the constitutional conventions of those States "provide, by ordinances irrevocable without the consent of the United States and the people of said States . . . for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control . . . ." The same provision was contained in the Enabling Act for Utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 267, 270; New Mexico and Arizona, 36 Stat. 557, 559, 570. Idaho and Wyoming were admitted after adoption of their constitutions; that of Wyoming contained an irrevocable ordinance in the same terms. Wyoming Constitution, 1889, Ordinances. § 5. The Constitution of Idaho, while it contained no irrevocable ordinance, had a provision even more explicit in its establishment of separation. Idaho Constitution, 1889, art. IX, § 5.

[10] See, *e. g.*, the New York experience, including, *inter alia*, the famous Hughes controversy of 1840-42, the conflict culminating in the Constitutional Convention of 1894, and the attempts to restore aid to parochial schools by revision of the New York City Charter, in 1901, and at the State Constitutional Convention of 1938. See McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870-1945 (1946) pp. 119-25; Mahoney, The Relation of the State to Religious Education in Early New York 1633-1825 (1941) c. VI; Hall, Religious Education in the Public Schools of the State and the City of New York

religious inculcation were a recognition of the principle of Separation by the establishment of church schools privately supported. Parochial schools were maintained by various denominations. These, however, were often beset by serious handicaps, financial and otherwise, so that the religious aims which they represented found other directions. There were experiments with vacation schools, with Saturday as well as Sunday schools.[11] They all fell short of their purpose. It was urged that by appearing to make religion a one-day-a-week matter, the Sunday school, which acquired national acceptance, tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson.

Out of these inadequate efforts evolved the week-day church school, held on one or more afternoons a week after the close of the public school. But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his "business hours."

The initiation of the movement[12] may fairly be attributed to Dr. George U. Wenner. The underlying assumption of his proposal, made at the Interfaith Conference on Federation held in New York City in 1905, was that the public school unduly monopolized the child's time and that the churches were entitled to their share of it.[13] This,

(1914) pp. 46-47; Boese, Public Education in the City of New York (1869) c. XIV; Compare New York Laws 1901, vol. 3, § 1152, p. 492, with amendment, *id.*, p. 668; see Nicholas Murray Butler, *Religion and Education* (Editorial) in 22 Educational Review 101, June, 1901; New York Times, April 8, 1901, p. 1, col. 1; April 9, 1901, p. 2, col. 5; April 19, 1901, p. 2 col. 2; April 21, 1901, p. 1, col. 3; Editorial, April 22, 1901, p. 6, col. 1.

Compare S. 2499, 79th Cong., 2d Sess., providing for Federal aid to education, and the controversy engendered over the inclusion in the aid program of sectarian schools, fully discussed in, e. g., "The Nation's Schools," January through June, 1947.

[11] For surveys of the development of private religious education, see, e. g., A. A. Brown, A History of Religious Education in Recent Times (1923); Athearn, Religious Education and American Democracy (1917); Burns and Kohlbrenner, A History of Catholic Education in the United States (1937); Lotz and Crawford, Studies in Religious Education (1931) Parts I and IV.

[12] Reference should be made to Jacob Gould Schurman, who in 1903 proposed a plan bearing close resemblance to that of Champaign. See Symposium, 75 The Outlook 635, 636, November 14, 1903; Crooker, Religious Freedom in American Education (1903) pp. 39 *et seq.*

[13] For the text of the resolution, a brief in its support, as well as an

the schools should "release." Accordingly, the Federation, citing the example of the Third Republic of France,[14] urged that upon the request of their parents children be excused from public school on Wednesday afternoon, so that the churches could provide "Sunday school on Wednesday." This was to be carried out on church premises under church authority. Those not desiring to attend church schools would continue their normal classes. Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.

The proposal aroused considerable opposition and it took another decade for a "released time" scheme to become part of a public school system. Gary, Indiana, inaugurated the movement. At a time when industrial expansion strained the communal facilities of the city, Superintendent of Schools Wirt suggested a fuller use of the school

exposition of some of the opposition it inspired, see Wenner's book, Religious Education and the Public School (rev. ed. 1913).

[14] The French example is cited not only by Wenner but also by Nicholas Murray Butler, who thought released time was "restoring the American system in the state of New York." *The Place of Religious Instruction in Our Educational System*, 7 Vital Speeches 167, 168 (Nov. 28, 1940); see also Report of the President of Columbia University, 1934, pp. 22-24. It is important to note, however, that the French practice must be viewed as the result of the struggle to emancipate the French schools from control by the Church. The leaders of this revolution, men like Paul Bert, Ferdinand Buisson, and Jules Ferry, agreed to this measure as one part of a great step towards, rather than a retreat from, the principle of Separation. The history of these events is described in Muzzey, *State, Church, and School in France*, The School Review, March through June, 1911.

In effect, moreover, the French practice differs in crucial respects from both the Wenner proposal and the Champaign system. The law of 1882 provided that "Public elementary schools will be closed one day a week in addition to Sunday in order to permit parents, if they so desire, to have their children given religious instruction outside of school buildings." Law No. 11,696, March 28, 1882, Bulletin des Lois, No. 690. This then approximates that aspect of released time generally known as "dismissed time." No children went to school on that day, and the public school was therefore not an alternative used to impel the children towards the religious school. The religious education was given "outside of school buildings."

The Vichy Government attempted to introduce a program of religious instruction within the public school system remarkably similar to that in effect in Champaign. The proposal was defeated by intense opposition which included the protest of the French clergy, who apparently feared State control of the Church. See Schwartz, *Religious Instruction under Pétain*, 58 Christian Century 1170, Sept. 24, 1941.

buildings. Building on theories which had become more or less current, he also urged that education was more than instruction in a classroom. The school was only one of several educational agencies. The library, the playground, the home, the church, all have their function in the child's proper unfolding. Accordingly, Wirt's plan sought to rotate the schedules of the children during the school-day so that some were in class, others were in the library, still others in the playground. And some, he suggested to the leading ministers of the City, might be released to attend religious classes if the churches of the City cooperated and provided them. They did, in 1914, and thus was "released time" begun. The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools.[15]

From such a beginning "released time" has attained substantial proportions. In 1914-15, under the Gary program, 619 pupils left the public schools for the church schools during one period a week. According to responsible figures almost 2,000,000 in some 2,200 communities participated in "released time" programs during 1947.[16] A movement of such scope indicates the importance of the problem to which the "released time" programs are directed. But to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement operates, the more ominous the breaches in the wall of separation.

Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some "released time" classes are under separate denominational auspices, others are conducted jointly by several denom-

[15] Of the many expositions of the Gary plan, see, e. g., A. A. Brown, *The Week-Day Church Schools of Gary, Indiana*, 11 Religious Education 5 (1916); Wirt, *The Gary Public Schools and the Churches*, *id.* at 221 (1916).

[16] See the 1947 Yearbook, International Council of Religious Education, p. 76; also New York Times, September 21, 1947, p. 22, col. 1.

inations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.[17]

The substantial differences among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign? Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, "subject to the approval and supervision of the superintendent." The courses do not profess to give secular instruction in subjects

[17] Respects in which programs differ include, for example, the amount of supervision by the public school of attendance and performance in the religious class, of the course of study, of the selection of teachers; methods of enrolment and dismissal from the secular classes; the amount of school time devoted to operation of the program; the extent to which school property and administrative machinery are involved; the effect on the public school program of the introduction of "released time"; the proportion of students who seek to be excused; the effect of the program on non-participants; the amount and nature of the publicity for the program in the public schools.

The studies of detail in "released time" programs are voluminous. Most of these may be found in the issues of such periodicals as The International Journal of Religious Education, Religious Education, and Christian Century. For some of the more comprehensive studies found elsewhere, see Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin 1941, No. 3; Gorham, A Study of the Status of Weekday Church Schools in the United States (1934); Lotz, *The Weekday Church School*, in Lotz and Crawford, Studies in Religious Education (1931) c. XII; Forsyth, Week-Day Church Schools (1930); Settle, The Weekday Church School, Educational Bulletin No. 601 of The International Council of Religious Education (1930); Shaver, Present-Day Trends in Religious Education (1928) cc. VII, VIII; Gove, Religious Education on Public School Time (1926).

concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent "who in turn will determine whether or not it is practical for said group to teach in said school system." If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.[18] Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are pre-

[18] It deserves notice that in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that "allowing him to take the religious education course might help him to become a member of the group."

cisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.[19]

Mention should not be omitted that the integration of religious instruction within the school system as practiced in Champaign is supported by arguments drawn from educational theories as diverse as those derived from Catholic conceptions and from the writings of John Dewey.[20] Movements like "released time" are seldom single in

[19] The divergent views expressed in the briefs submitted here on behalf of various religious organizations, as *amici curiae*, in themselves suggest that the movement has been a divisive and not an irenic influence in the community: The American Unitarian Association; The General Conference of Seventh Day Adventists; The Joint Conference Committee on Public Relations set up by the Southern Baptist Convention, The Northern Baptist Convention, The National Baptist Convention Inc., and the National Baptist Convention; The Protestant Council of the City of New York; and The Synagogue Council of America and National Community Relations Advisory Council.

[20] There is a prolific literature on the educational, social and religious merits of the "released time" movement. In support of "released time" the following may be mentioned: The International Council of Religious Education, and particularly the writings of Dr. Erwin L. Shaver, for some years Director of its Department of Weekday Religious Education, in publications of the Council and in numerous issues of The International Journal of Religious Education (*e. g.*, *They Reach One-Third*, Dec., 1943, p. 11; *Weekday Religious Education Today*, Jan., 1944, p. 6), and Religious Education (*e. g.*, *Survey of Week-Day Religious Education*, Feb., 1922, p. 51; *The Movement for Weekday Religious Education*, Jan.-Feb., 1946, p. 6); see also Information Service, Federal Council of Churches of Christ, May 29, 1943. See also Cutton, *Answering the Arguments*, The International Journal of Religious Education, June, 1930, p. 9, and *Released Time*, *id.*, Sept., 1942, p. 12; Hauser, *"Hands Off the Public School?"*, Religious Education, Mar.-Apr., 1942, p. 99; Collins, *Release Time for Religious Instruction*, National Catholic Education Association Bulletin, May, 1945, pp. 21, 27-28; Weigle, *Public Education and Religion*, Religious Education, Apr.-June, 1940, p. 67; Nicholas Murray Butler, *The Place of Religious Instruction in Our Educational System*, 7 Vital Speeches 167 (Nov. 28, 1940); Howlett, *Released Time for Religious Education in New York City*, 64 Education 523, May, 1944; Blair, *A Case for the Weekday Church School*, 7 Frontiers of Democracy 75, Dec. 15, 1940; cf. Allred, Legal Aspects of Release Time (National Catholic Welfare Conference, 1947). Favorable views are also cited in the studies in note 17, *supra*. Many not opposed to "released time" have declared it "hardly enough" or "pitifully inadequate." *E. g.*, Fleming, God in Our Public Schools (2d ed. 1944) pp. 80-86; Howlett, *Released Time for Religious Education in New York City*, Religious Education, Mar.-Apr., 1942, p. 104; Cavert, *Points of Tension Between Church and State in America Today*, in Church and State

origin or aim. Nor can the intrusion of religious instruction into the public school system of Champaign be minimized by saying that it absorbs less than an hour a week; in fact, that affords evidence of a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as "dismissed time," whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school.[21] The momentum of the whole school at-

in the Modern World (1937) 161, 168; F. E. Johnson, The Church and Society (1935) 125; Hubner, Professional Attitudes toward Religion in the Public Schools of the United States Since 1900 (1944) 108-109, 113; cf. Ryan, *A Protestant Experiment in Religious Education*, The Catholic World, June, 1922; Elliott, *Are Weekday Church Schools the Solution?*, The International Journal of Religious Education, Nov., 1940, p. 8; Elliott, *Report of the Discussion*, Religious Education, July-Sept., 1940, p. 158.

For opposing views, see V. T. Thayer, Religion in Public Education (1947) cc. VII, VIII; Moehlman, The Church as Educator (1947) c. X; Chave, A Functional Approach to Religious Education (1947) 104-107; A. W. Johnson, The Legal Status of Church-State Relationships in the United States (1934) 129-130; Newman, The Sectarian Invasion of Our Public Schools (1925). See also Payson Smith, *The Public Schools and Religious Education*, in Religion and Education (Sperry, Editor, 1945) 32, 42-47; Herrick, *Religion in the Public Schools of America*, 46 Elementary School Journal 119, Nov., 1945; Kallen, *Churchmen's Claims on the Public School*, The Nation's Schools, May, 1942, p. 49; June, 1942, p. 52. And cf. John Dewey, *Religion in Our Schools* (1908), reprinted in 2 Characters and Events (1929) 504, 508, 514. "Released time" was introduced in the public schools of the City of New York over the opposition of organizations like the Public Education Association and the United Parents Associations.

The arguments and sources pro and con are collected in Hubner, Professional Attitudes toward Religion in the Public Schools in the United States Since 1900 (1944) 94 *et seq.* And see the symposia, *Teaching Religion in a Democracy*, The International Journal of Religious Education, Nov., 1940, pp. 6-16; *The Aims of Week-Day Religious Education*, Religious Education, Feb., 1922, p. 11; *Released Time in New York City*, *id.*, Jan.-Feb., 1943, p. 15; *Progress in Weekday Religious Education*, *id.*, Jan.-Feb., 1946, p. 6; *Can Our Public Schools Do More about Religion?*, 125 Journal of Education 245, Nov., 1942, *id.* at 273, Dec., 1942; *Religious Instruction on School Time*, 7 Frontiers of Democracy 72-77, Dec. 15, 1940; and the articles in 64 Education 519 *et seq.*, May, 1944.

[21] See note 14, *supra*. Indications are that "dismissed time" is used in an inconsiderable number of the communities employing released time. Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin

mosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of "released time" as being only half or three quarters of an hour is to draw a thread from a fabric.

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program. We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, "good fences make good neighbors."

1941, No. 3, p. 22; Shaver, *The Movement for Weekday Religious Education*, Religious Education, Jan.-Feb., 1946, pp. 6, 9.

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